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Legislative Assembly of Ontario

Standing Committee on Administration of Justice
Alternative Dispute Resolution



Second Session, 34th Parliament
Monday 12 February 1990

Speaker: Honourable Hugh A. Edighoffer
Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Monday 12 February 1990

The committee met at 1341 in room 228.

ALTERNATIVE DISPUTE RESOLUTION

The Chair: I would like to convene this session of the standing committee on administration of justice. The committee today commences a study of alternative dispute resolution, or ADR. By way of background, I would like to review the aims of our study, and how the subject of ADR came to be before the committee.

As a result of major changes to the standing orders of the Legislative Assembly that came into force in October 1989, certain standing committees acquired the authority to establish their own agenda items for study and report to the Legislative Assembly.

Pursuant to standing order 106, the standing committee on administration of justice agreed on Tuesday 24 October 1989 to undertake a long-term study of alternative dispute resolution mechanisms. The committee's order, included in members' background information packages, sets out the objectives of the study as follows:

Ordered, that the standing committee on administration of justice initiate research and conduct public hearings and report to the House on the issue of alternative dispute settling mechanisms outside the court structure, including:

- (a) current status in Ontario and Canada;
- (b) appropriateness or otherwise of Ontario promoting and enhancing alternative dispute settling mechanisms;
- (c) whether or not a proactive government policy will alleviate pressures on Ontario's judicial system and expedite resolution of disputes;
- (d) methods of resolving minor monetary civil disputes.

What is ADR? Alternative dispute resolution covers a broad range of nonjudicial measures for resolving conflicts, including negotiation, mediation and arbitration, private judging, neutral expert fact-finding, mini-trial, summary jury trial and moderated settlement conference.

The study by the standing committee on administration of justice will include: a broad, philosophical review of the concept of ADR; an examination of the existing situation in Ontario and other jurisdictions, as well as the application

of ADR in particular areas of law—public/administrative, commercial, environmental, family, native/northern issues, labour and criminal/correctional. The committee will also review methods of resolving minor monetary civil disputes. The aim of the study is to consider the extent to which Ontario public policy should develop and encourage alternative means for resolution of disputes.

Witnesses scheduled include representatives from the Canadian Bar Association, the American Bar Association, Quebec Small Claims Mediation, Multi-Door Dispute Resolution Division of Washington, DC, the Ontario Ombudsman, Chiefs of Ontario, and the Canadian Institute for Conflict Resolution.

Before calling upon the committee research officer to give an overview of the committee's schedule, I would ask the committee clerk to outline the documents distributed to the members.

Clerk of the committee: In addition to research papers prepared by the committee research officer, CVs of scheduled witnesses and certain submissions from witnesses—all of which have been placed before members today—the following documents were distributed to members' offices during the week of 29 January:

Terms of reference of the committee's study, as set out in the report of the subcommittee on committee business, adopted on Wednesday 24 October 1989;

Proposed schedule of ADR hearings;

Background paper on Alternative Dispute Resolution in Canada, prepared by Susan Swift, research officer;

Canadian Bar Association task force report, Alternative Dispute Resolution: A Canadian Perspective;

Alternative Dispute Resolution That Works!, by Ernest G. Tannis;

Report of the Attorney General's Advisory Committee on Mediation in Family Law;

Report of Robert W. Macaulay: Directions, Review of Ontario's Regulatory Agencies, Overview.

The Chair: I would now ask the research officer to address the committee with regard to our schedule of witnesses.

Mr. Fenson: In the next few weeks the committee is going to hear from witnesses professionally involved in different ways with dispute resolution.

Some methods operate under statute, others are based entirely on the parties' decision to attempt resolution of the problem. Some are associated with lawyer-driven court proceedings, some are not. Disputants may reach ADR willingly or under compulsion. In some instances, recourse may be had to the courts over procedure or over an unsatisfactory result; in others, not.

A court in Washington, DC, has as part of its staff, intake officers who may let the dispute enter the court stream, or may suggest or require some alternative. They also have had several experiments right within the trial system of looking at the court lists and pulling the judges from trials for a week or so and trying to mediate the 600 or 700 oldest cases available, with about a 40 per cent success rate. So some programs are co-ordinated with the court and some are completely outside.

We will have members of lawyers' groups such as the Advocates' Society and the Canadian Bar Association talking about the lawyer's perspective. I think there will be some emphasis in those talks on the utility of pre-trial procedures and the capability of the justice system as it is now functioning to, in effect, mediate and reach settlement before things come to trial. The question is whether these things settle very early in the procedure or whether, as seems to be increasingly the case, they wait until the eve of trial. In that latter case, there may not be enormous savings to the parties, but these are questions which should be raised and will be rehearsed during the next few weeks.

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We will also have people active in community-based mediation services who deal with the sorts of disputes that can, but usually do not, enter the court system, such as backyard disputes. There are even some schoolyard dispute projects. Some of these community organizations also on contract take on victim-offender reconciliation projects, an aspect of criminal law which is generally not dealt with by the court but which has received increasing attention.

We will hear of the use of mediation in native land claim disputes and in land use policy decision-making.

Some examples of alternative dispute resolutions that function entirely outside the court again fall into two categories, examples where the

choice for an outside forum is entirely voluntary and consensual by the parties, and in fact there are commercial services, arbitration and mediation services, to which, for example, insurance companies will take recourse trying to settle claims instead of using the courts, where possible. In some cases statutes actually remove from the court system types of disputes which might otherwise be the subject of civil litigations. As you know, car insurance may be such a thing. Workers' compensation matters and many labour matters have been removed at certain levels from the court by statute. Thus, ADR covers a very broad range of activities which have a great variety of legal statuses.

It might be helpful if I just go through quickly the witnesses we will be hearing this week, and next week perhaps Susan Swift can take you through the witnesses for the remainder of the hearing. Then I will finish by reviewing some topics that the members might find useful to keep in mind in questioning.

Today we are going to be hearing Shin Imai from the Attorney General's task force on court reform. He will be giving a general introduction and his perspective is, I assume, the current Ontario and other Canadian initiatives in the context of the courts. You will have opportunity to hear him at length shortly.

Michael Cochrane from the policy development division of the Ministry of the Attorney General will be next. He is the chairman of the Attorney General's Advisory Committee on Mediation in Family Law, which issued a report recommending voluntary mediation in the family context, which is in contrast to the California system which is mandatory, so that will provide an interesting opportunity to compare.

William McMurtry of the firm of Blaney, McMurtry and Stapells is the chair of the Advocates' Society committee on alternative dispute resolution. He has concerns about the possible attack on the ordinary process of civil litigation that, say, a new statute on alternative dispute resolution might constitute and will be discussing the question of how civil disputes settle before trial and its relevance to the question of ADR.

John Kelly of the same law firm is with the Canadian Bar Association's task force on ADR. He has a lot of litigation experience and will speak of different dispute resolution mechanisms in the context of his experience.

Ernest Tannis, whom you will hear tomorrow, has been professionally involved in a formal conflict resolution for a long time. He is a great

advocate of co-operative modes. He is one of a number of witnesses who I think will tend to the view that the adversarial mode, which is the model the court uses and gives us, is by no means the only good or necessary model for dispute resolution. Obviously, even some alternative dispute resolution methods use the adversarial model. There is a lot of feeling in the ADR professions that it is not a suitable model, and even the courts have recognized that in part with their family mediation projects.

He will take a very sort of theoretical approach and has a lot of experience outside of Canada as well as in Canada and can talk about some of the more innovative methods, especially those that have drifted quite far from the methodology of courts.

Melinda Ostermeyer is the chief deputy clerk of the Superior Court of the District of Columbia, which has a very elaborate system that I referred to briefly a few minutes ago, evaluating roughly disputes that come to the door of the court and using professional staff to divert them, either to optional methods available to the parties in the community or to mandatory pre-trial mediation. It was one of three such projects started as an experiment by the American Bar Association, and there are now seven in operation. Ms Ostermeyer has run two of the three original pilots and this is probably the most complex interaction between a court system and other dispute resolution mechanisms, so this will be a rare opportunity to hear how problems are diverted from the courts' very door to other methods.

Paul Emond teaches at Osgoode Hall Law School. He has written a good deal on the dispute resolution and he is active in a group called Conflict Management Resources, which is a joint enterprise of Osgoode Hall Law School and York University's environmental studies faculty. He has a lot to say about the use of ADR in environmental resource development and native dispute contexts.

Gordon Henderson is a well-known lawyer from the firm of Gowling, Strathy and Henderson in Ottawa, with offices in other cities. He has been involved with several associations dealing with conflict resolution and will be another one of the speakers giving an interesting perspective of the practising lawyer's role in dispute resolution.

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Dean Peachey, like Ernest Tannis, has been professionally involved in alternative dispute resolutions. He runs an organization which is

something of a clearing house for these services in Canada. He works out of Kitchener. It is called the Network for Community Justice and Conflict Resolution. He has done a lot of training of people to operate as mediators in different social contexts and different dispute contexts. He has done training of natives in the Arctic and in a lot of other interesting settings. He, like Ernest Tannis, will have, I think, a strong advocate's view of alternative dispute methods.

We will have Christiane Coulombe, who is the lawyer in charge of the Montreal mediation services attached to the Quebec small claims court. It now functions in three or four cities in Quebec. It has been a permanent feature of small claims court since 1986. As I said, it is an optional route that parties can take. They can go right to trial, if they wish, but it is an example of a mediation service regularly offered by people on their way into a particular court.

Martin Campbell used to be with the Ministry of Health and was on the staff of the Macaulay report. He is now with the firm of Beard Winter. He has a good deal of experience in administrative law. He will be talking about the possible role of dispute resolution services to be made available in conjunction with government agencies. This is the topic dealt with in part by the Macaulay report.

Bonita J. Thompson is a lawyer from Vancouver who is involved with a commercial dispute resolution service which has mostly commercial and, among other commercial, insurance disputes resolved. It is a service paid for by the users and it has its counterpart to some degree in a service founded by the next speaker, Robert Blair, of a Toronto law firm, who founded something called the Private Court, which has a panel of distinguished practitioners who basically are available to parties in commercial disputes to act as a court. The advantage is, of course, that they have simpler rules of procedure. The court date is the court date, and the idea is that things are dealt with judiciously but in a more summary and less procedure-ridden manner. Obviously, it is a system in which lawyers have a full role. So Mr Blair will tell us about that.

Norman Sherman, who is a lawyer but a practising arbitrator, will come with two colleagues to discuss the use of arbitration in different contexts. One is family arbitration, which is actually unusual in that in most family situations mediation is used. Also, car insurance and other commercial topics are dealt with this way.

So that is the first week's lineup. Similar notes will be forthcoming on the second and third week. You are going to be hearing a mixture of accounts. Some are going to be descriptions of services that exist, others are going to be more polemical papers arguing one or another theoretical position.

To try to put some shape of it in your own mind, I have prepared some clusters of questions which you might keep in your mind. I guess the overwhelming question might be, should the province have a policy and what form should that policy take, a policy on alternative dispute resolution?

Some of the headings under which you might consider this is, first of all, the adversarial system, whether it is the necessary model for dispute resolution, whether alternative dispute resolutions should function within that model or whether other models, such as a more co-operative form of dispute resolution, are desirable.

Are some types of disputes by their very nature more suitably resolved by adversarial contact, and are others more obviously not suitably dealt with by adversarial situations, such as family disputes? Courts have recognized the inappropriateness of the adversarial element in certain aspects of family disputes and have actually been fairly active in creating mediation that buffers part of the conflict from the adversarial aspects of the court resolution which follows.

That is one range of questions you might have in your mind. Which disputes are happier in an adversarial situation and which are happier outside? That may be one way of dividing the universe of disputes.

Costs: is the goal of an ADR dispute resolution system, if there is going to be one or if what exists is to be expanded, to save costs for the parties to the dispute or is the goal to save government the costs of running a court system that might be larger than is necessary, or is that a primary issue at all? If the costs of running courts were lessened, should that money be spent by the government in some way to run or encourage development of alternative dispute resolutions?

The question is the criteria for evaluating the success of alternative dispute resolution. Is it diminished costs? Should we be worried about the loss of the moral authority of having judgements from a court because that may not be available from other methods of resolving disputes? Will the loser in a dispute feel that he or she has been treated judiciously if he loses the

dispute dealt with in a nonjudicial manner? These are things you may want to consider.

What is the goal of these deliberations? Is the purpose to encourage alternatives to the current justice system, obviously not totally, but a partial alternative, and is that alternative to be mandatory or optional? Is it to make available methods of resolving disputes that in real life do not get to the court system, either because it is not in the court's jurisdiction or because the monetary value of the dispute is so small?

What should the government's role be? Should it be detailed legislation setting up new machinery? Should it be an attempt simply to create an encouraging context? Should it be education? Should it be fine-tooling of pre-trial procedures within the context of the court system or perhaps should it have no role at all?

Another thing to keep in mind in terms of the government's possible role is the fact that courts are forums that keep records of all their proceedings and therefore provide the government and the public with important social data, on which values are being maintained and encouraged by the courts, but also the numbers of disputes that appear before the courts and the scale of certain types of problems.

Assuming that there are to be other methods of resolving disputes, should the government at least insist, perhaps through legislation, that certain minimal recordkeeping be kept, that records be provided so that the government can keep track of the numbers of disputes being processed, the way they are being disputed and perhaps create a certain informal body of common law? If everything were moved from courts of records to nonrecorded proceedings, it would create a new gap in the sort of information we have about how disputes in various areas are best dealt with.

What are the lawyers' roles in alternative methods? Should various forums discourage or forbid counsel or agents or should they encourage this? This is a question that will doubtless come up when lawyers are speaking to the committee.

1410

To go back to the question of precedents and judgements, is there a risk of our losing an important social facility, an important social guideline in a body of disputes. I suppose we should not exaggerate in our minds the role of precedents in the lower areas of court disputes. Obviously, important provisions in the Criminal Code are going to get rehearsed in the Supreme Court of Canada often enough for us to have an

idea of how the court views it, whereas very frequently litigated disputes such as landlord and tenant disputes under the Residential Tenancies Act may never go to a superior court and therefore the certainty of the law is simply not there.

It is still a matter of wide opinion among judges whether someone can be evicted from residential premises under the Residential Tenancies Act for breaking a parallel covenant not to keep a pet in an apartment. The Attorney General (Mr Scott) has publicly expressed one view and judges have persisted in making contrary findings. So a precedent is not always a guide; in other words, courts do not always provide reliable precedents in interpretation of statutes, so the loss might not be as great as we think where smaller disputes are moved from a court setting to a noncourt setting.

Is precourt screening such as goes on in the District of Columbia and other centres in the United States a major method that we should be looking at, precourt screening and also pre-trial procedures? Even though we know the majority of cases taken to a lawyer do not end up going to trial, perhaps fewer than one in 10 or one in 20—I do not know exactly what it is but practitioners have given me that sort of ratio as a ballpark percentage—if we move too much from the doorstep of the court, if the focusing effect of the distant possibility of a trial is removed, is there a danger disputes will not be resolved as rationally and as fairly, will not be settled as sensibly as they would be if they were done under the shadow of a possible trial at the end of the road?

To what extent does the possibility of a trial make people more sensible about the value of their cases and firmer about standing on their rights? May people simply throw away their rights if they are settled simply in a mediator's context, whereas if they had the knowledge of what a court might do, even though it is unlikely it is going to reach the court, they may deal with the matter differently.

How central in all this is the question of procedural protection? To simplify procedures is generally to reduce the length of the dispute resolution process and to lower the costs, but does it make things fair? What will be lost and what will be gained if procedures are simplified or if procedures are simply ad hoc, as they are in some dispute resolution methods?

It may be that there is research to be done. So far we have found that there is not all that much solid data comparing the cost of dispute resolutions when done in court and when done in other

contexts, but some of our witnesses will present figures based on their own experience in certain contexts.

If the government is to have a policy, should it be one that is embodied in a statute? Should a statute be a procedural code, a kind of universal code, for different alternative dispute resolution methods or should it simply be a nonstatutory policy encouraging, perhaps with grants, the development privately or in the community of other forums? Again, what should the reporting and recording requirements be of these other media for dispute resolution? Should we lose knowledge of how disputes are being resolved, which we will if we move the resolution from the courts to other forums without providing for some kind of reporting?

The last topic I will mention is the question of training and qualification of people doing the arbitrating, the mediating. Should there be licensing of the professionals? Should there be training? Should it be conducted at law schools? The fulcrum on which the adversary system moves is the responsibility of the parties to bring all the information to the court and the judge is not supposed to have very much knowledge, is not supposed to bring personal knowledge to the case, whereas in mediation proceedings it is expected that the mediator will bring, if not knowledge of the particular facts of the case, a professional knowledge of the particular context. There is a role for the knowledge that health professionals or family therapy professionals would have in certain types of mediation contexts. So it is not clear that law schools, for example, are the proper place for educating mediators, but that is a question you may want to address.

The Chair: Are there any questions? Mr Jackson had his hand up, then Mr McGuinty.

Mr Jackson: I guess it was more to the point about the full two and a half weeks' docket in terms of whether we are going to be hearing from the Arbitrators' Institute of Canada (Ontario) as a group that is currently doing work in Ontario. I am impressed with the list of individuals who are going to come before the committee and their credentials, but it seems that the Ontario examples very heavily favour bureaucrats and/or practising lawyers of some districts. Could I get some response to that.

The Chair: I wonder if I can respond to that, and first of all, in terms of process. Efforts have been made in a number of cases to broaden out the range of witnesses and we have not always been successful, but as a matter of process, what

I would suggest for the committee to perhaps consider as we get into this is some of the shortfalls we have and look to add not only the suggestion you have, but other suggestions that might come forward from committee members. For example, we appear to be a little light on the labour side and we may want to go to some expertise in labour arbitrations. We may want to go to the group you suggested. We may consequently want to set aside half an hour in the foreseeable future for the committee to discuss in a more general way the range of witnesses that perhaps we can bring additionally to the committee.

Mr Jackson: The other two angles to add to the one I first raised has to do with the notion, for example, that under the automobile insurance bill the Liberal government is bringing forward there is a recognition of an arbitration process, but it does not involve independent arbitrators at arm's length in some of the models we are talking about. We are talking about hiring civil servants to do that. They will still be independent, but independent and arbitrator are synonymous in everybody's vocabulary, one would hope. But in terms of their relationship to whether they are employees of the government or whether these are services as in some of the American models we will be exposed to, I have a concern that we perhaps look at making sure there is a balance on that issue.

The other one is on the disproportionate number of women coming forward to the committee. I count something in the neighbourhood of about 16 or 17 deputants, of which I find there are only four women. When it deals with the issue of mediation and arbitration and family law matters, we are aware that there is some degree of sensitivity on this issue with access and custody and support enforcement legislation, which in the last two years in this province have caused some concern.

I personally would like, maybe at the end of the session—I know we have a letter we are going to deal with from the Ontario Association of Interval and Transition Houses, but they are just the tip of a rather large iceberg of concerns with respect to mediation and family law. Those are concerns I wanted to share with the committee up front. I will be present for all the committee hearings and look forward to being helpful and making sure we come out with an outstanding report.

1420

The Chair: Would you think it advisable for the committee to set some time aside in the next

two or three days specifically to review the agenda for the next three weeks, to address those specific types of issues?

Mr Jackson: I think the subcommittee might serve you well, Mr Chairman, and we can report back to the committee. I think at this point there is general agreement that we try to be as open and accessible to as much information as possible this early in our inquiry.

The Chair: If it is agreeable to the committee generally, perhaps a subcommittee should meet before the end of this week to assess the agenda and take into account the types of comments that you are making now and that other committee members may want to share with the subcommittee in terms of the agenda items.

Mr McGuinty: Mr Fenson, you implied that those involved in mediation are not necessarily lawyers. That does not disturb me because there is no necessary correlation between legal training and the capacity to mediate. In fact, an argument could be made that the correlation is inverse. Is there any regulation of those involved, any definition of qualifications of people who have set themselves up in this field?

Mr Fenson: Only for those forums of mediation or arbitration that are set up by statute. For example, in a labour context there is a panel that the Ministry of Labour has. I think they are all lawyers in fact. But there is not for people simply setting up on their own to mediate backyard disputes or family disputes.

Mr McGuinty: So conceivably someone could get into that business on that basis of general experience.

Mr Fenson: Yes.

The Chair: Any further questions? If not, then we will go to our first witness, Shin Imai from the Ministry of the Attorney General. Mr Imai, would you come forward please. Mr Cochrane, are you going to share in the presentation or were you going to come forward after?

Mr Cochrane: I thought I would wait until Mr Imai is finished.

The Chair: If you do not mind, Mr Cochrane, you might come forward now, if you will.

We have scheduled for your time slot between 2:30 and 3:30 but we have some flexibility in that.

Mr Imai: I was planning to have my presentation restricted to 20 or 30 minutes to allow time for questions.

The Chair: That is fine.

MINISTRY OF THE ATTORNEY GENERAL

Mr Imai: I wish to say first that as some of the members of the committee have stated, I am very impressed with the list of speakers and I think that it should, over the next two weeks, provide an introduction to the kaleidoscope of ideas, techniques and philosophies that come under the rubric of alternative dispute resolution.

I am not going to go into details of specific techniques. I think Avrum Fenson has introduced some of them and the speakers will be able to provide description in greater detail. What I thought I could contribute was some of the elements that I think are important to consider when one is in a position of having to decide whether a particular alternative dispute resolution technique should be adopted or not.

Avrum has described many of the questions. I do not have as many as he has. I have restricted them to five major categories. He has mentioned that some of the witnesses are, as he has described them, advocates. I think many people have been in the field and will be making their case strongly to you and I think that there are approaches that you should be taking in terms of analysing what they say and being able to judge the strengths and weaknesses of their case.

I wish to clarify that the comments I am about to make are my own and do not necessarily reflect the views of the ministry. The five questions that I ask myself in looking at an ADR technique are the following:

1. Why is the technique necessary? What is wrong with what is happening now or what is not happening now that makes it important to look at an alternative?

2. Does it appear that the technique will accomplish its objective? This may seem like a trite question. Why would someone suggest that something be done if it is not going to accomplish its objective? In fact, in the ADR field now and in the literature it is one of the most hotly debated topics. How effective is ADR? How effective are these techniques? I think it is important to look at that issue and see if the objective is likely to be achieved.

3. What sacrifices have to be made when ADR is chosen? There are almost always tradeoffs that have to be made and these tradeoffs should be weighed carefully against the benefits in order to decide whether it is desirable to pursue that alternative.

4. Avrum has mentioned some of this. What are the appropriate roles for the players, the government, the users of the system, the lawyers, the ADR practitioners and so on?

5. How should the technique be actually implemented on the ground? How should it be introduced and how do we know whether it works?

As I say, the experience, especially in the United States over the last 10 years, is that there are no easy answers. ADR is not a panacea. There are many contexts in which it is very successful and very desirable, and there are also contexts in which there are very serious failures and actually, in some cases, I think harmful results have resulted. So I think that it has to be carefully evaluated in order to make sure that we get the good and not the bad.

Let me elaborate a little bit on these five questions. The first question was "Why do we need ADR?" In fact, that was the second question I asked myself. The first question was "What does ADR stand for?" I find that, for those who are not in the field, that is usually somewhat puzzling. They do now know what the alternative is for and that type of thing.

I found that the second question, which is "Why do we need it?" is in fact not an awfully useful way to frame the question. To say "Why do we need ADR?" is to assume that it is one thing that you are either for or against. In fact, as Avrum has indicated, it is a wide variety of techniques used in disparate circumstances based on totally different philosophies, so I think it is better to look at specific issues and say, "Is this specific technique appropriate in this specific circumstance?"

I think this is important because these ADR techniques can have very different objectives. They may be for reducing court costs. The objective may be to save the parties money. The object may be that the adversarial way of resolving the dispute is not as appropriate as mediating the dispute. It may be that there should be more community involvement in resolution of the dispute and so on. So it is very important to look at the objective.

One example is mediation in the family context and the commercial context. The technique itself is the same. You have a mediator who does not actually make a decision but sits there as a neutral party and attempts to facilitate the resolution of an agreement between the two parties. So the technique is the same in the family context and the commercial context but the objective may be very different.

Proponents of family mediation say that the purpose in that context is to allow the parties in a nonadversarial context to come to a resolution and hopefully use that as a basis for an ongoing

relationship, which may be necessary, for example, if there are children and there is shared parenting. In the commercial context the objective could be very different. It could be merely to save court costs and legal fees and to bring the dispute to an end at a much earlier stage in the proceedings. So you can have one technique and, depending on the context in which it is used, it may be good or it may be bad, for example, you may say that mediation in the commercial context is good but it does not work in a family context or vice versa.

1430

The second question, assuming that we have identified the technique and the objective, is "Will it accomplish its goal?" As I said previously, this is a very hotly debated topic and previously there was a lot of literature claiming that there were unqualified successes from all these ADR schemes. There was a lot of flag-waving and cheerleading. I think some of that literature is still with us, but the people in the field have progressed to the point where the approach is more responsible, more objective, more scientific.

Let me discuss a little bit about arbitration and mediation and refer a little bit to some of the research against some of the advantages that are claimed for each of these techniques. In arbitration, as Avrum has suggested, you have a decision-maker and basically the parties go out, hire a decision-maker and agree that they are going to be bound by the decision. Arbitration could be compulsory or voluntary.

In Ontario, outside of the labour context and a few statutes, it is mostly voluntary arbitration. Is this something that should be explored? Is it a technique that can accomplish its goal? If the goal of encouraging arbitration is to take matters outside of the court, I think that at the present time there is some doubt about whether the public and the users are ready to do that.

You are going to be hearing from Bonita Thompson, who is associated with the British Columbia International Commercial Arbitration Centre. There is an arbitration centre in Quebec City that you may know of and there is the Private Court in Toronto, which is basically an arbitration scheme.

None of these places have a great volume. They are voluntary arbitration schemes, but people are not flocking to them in great numbers. The BC and Quebec centres are heavily subsidized by public funding and they are a long way from breaking even. So if we are looking at voluntary arbitration, at least at this point, it does

not seem like opening an centre is going to necessarily—again assuming that the objective is to take matters out of court—achieve that objective, because people will not go to it. So maybe a different type of approach has to be taken.

This is not to say that voluntary arbitration is not something that should be explored, but I do not think the answer is that simple. Perhaps a better approach would be to be more specific and to look at specific disputes and see if people are attracted to an arbitration scheme in specific disputes.

There have been two recent initiatives that are interesting. One is the Ontario Motor Vehicle Arbitration Plan, which provides for purchasers of new vehicles access to an arbitration panel. The whole scheme is paid by the manufacturers of automobiles. At the present time, within four weeks you can get a decision. They do something under 400 arbitrations a year. It has, I think, been extended for another couple of years. There you have a voluntary arbitration scheme that has received a favourable evaluation and it may be something to look at.

In another specific context again, I think you mentioned that there was arbitration available as an option under the new auto insurance legislation. Again, it is focused to a specific target market and we will be able to tell, I think, get an indication and perhaps some information on how successful that is as an option.

With respect to mediation, the question is "Will the technique work?" I think it is controversial, especially in the family context. Proponents of mediation claim that the parties are more satisfied with the process, the justice system is saved money, the parties are saved money, the rate of compliance is higher and the parties have a better relationship after the resolution of the dispute.

Depending on the particular proponent, this can be stated more or less strongly. The empirical studies that are now coming out about it show that some of these things are probably true, but there is not a dramatic difference between the existing court process and mediation. I do not have time to refer you to all these studies, but just to summarize, I think one thing that is clear is that people who go through mediation like it better. However, the fact that somebody likes it does not mean that you are necessarily getting a just result.

With respect to the cost to the parties, there are two studies which indicate in fact that the parties

have to pay more if they go through mediation. So it is not a big saving necessarily.

With respect to compliance, there is some evidence that in mediated agreements the compliance is slightly higher than in nonmediated agreements, but again, there is a lack of empirical studies to confirm that.

With respect to the quality of agreements, mediated agreements appear to show more compromise and less of a win-loss situation, which may be good or bad depending on what your view of the outcome is. Joint custody is quite a controversial issue, I think, and if you feel that joint custody is desirable, then mediation appears to lead to more joint custody orders. If there is a problem with joint custody, then it is problematic to look at mediation.

With respect to the effect on the court system, the evidence is that it does not reduce court congestion and in fact generally appears to add to costs of the justice system, because you are adding another service that people can go to.

With respect to the rates of agreements, the current literature suggests that it runs at 50 to 60 per cent in family and community cases. I do not have the stats on the commercial cases, but I think Brian Gardiner, who will be one of your witnesses later, will be able to give you some information on that.

With the rate of agreements, it is very difficult to use that as a good yardstick. In civil cases, 95 to 98 per cent of the cases settle outside of court. If you have mediation and they are settling 80 to 85 per cent, you are not doing any better than the court system. I think that just indicates the problems with using those type of statistics to judge whether something is successful or not.

There are problems in mediation with the quality of justice that have been raised by people representing poor people and women with respect to second-class justice and the lack of procedural protections. With respect to the post-dispute climate, again with respect to family mediation, the evidence does not support the claim that mediation improves the post-dispute climate necessarily.

I think that you can take all of the claims and the studies are a bit ambivalent on the extent to which they can be supported. This is not to say that it is not something that should be pursued or anything like that. I just think that in terms of looking at the topic and making the judgement, it is important to keep some of these factors in mind.

The third question is "What sacrifices have to be made in choosing alternative dispute resolu-

tion?" I am repeating a little bit from what Avrum said but, as I stated, there is almost always tradeoffs that have to be made. For example, in arbitration you can get a quick hearing, but you do not have the procedural protections that you have in court.

For mediation, there may be a better way to resolve the dispute, but it may cost the justice system more. One of the advantages of ADR is that it is private, so you can keep your dispute outside of the public. You do not have to go to court and have a public record. At the same time, for some disputes it may not be particularly advantageous. Those disputes with a public impact, environmental disputes, criminal cases, constitutional cases and so on, you may want them in a public forum to resolve.

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Then there is the question of the quality of justice. While accepting the importance of community involvement in mediation, there is some criticism in the United States of neighbourhood justice centres, which deal with things that are so-called low end: family matters, petty criminal, landlord and tenant. The criticism with these neighbourhood justice centres is that they in fact become dumping grounds for all the cases that judges feel are inappropriate to be in the court. What in fact you have done is you have barred access to these groups to a court system.

Avrum mentioned the fact that perhaps it is easier to send out some of those cases on the low end to alternative dispute resolution techniques, because there is not very much precedential value. They do not go to the higher courts anyway. I guess that may be one of the reasons it is justified in the United States. I think there are policy issues about reserving—if you take out the low end, then you are left with a certain type of high-end case in the court only, and there are questions about whether that is appropriate.

The fourth question, "What is the appropriate role for government lawyers, arbitrators, mediators and clients," I will not elaborate on. There has been some discussion on the role of government and whether there should be certification and regulation of practitioners and so on.

The final question is "Do we think that it is going to work? How do we know?" As I say, in the United States there is growing literature on evaluation and a growing recognition of the importance of testing these techniques to make sure that they do work. There have been some things that have been instituted that were supposed to save the parties money, save the justice system money and settle things quicker.

In fact, they have done just the opposite. The reason they were able to realize that they had done the opposite is that they did have good evaluation techniques in place.

In conclusion, I would like to say that I think ADR has a great deal of potential. I hope my presentation does not seem negative at all. The witnesses in the coming weeks will be describing its application in commercial, criminal, family and neighbourhood contexts.

I think one novel application of ADR concepts will be in the first nation justice system. One of the most important tenets of ADR is that the process of dispute resolution should be put more into the hands of the people who are actually affected by the dispute, and this philosophy would certainly be consistent with the desire of first nations and aboriginal peoples to control their own justice system.

For all of these techniques, I think an objective and responsible approach should ensure that what is implemented will be of potential benefit to all disputants. Thank you.

The Chair: Mr Imai, did you want to take questions now or did you want to take joint questions after Mr Cochrane's presentation?

Mr Cochrane: I am happy to go ahead and make my presentation. If there are specific questions to either of us, then we could field them.

By way of introduction, my name is Mike Cochrane. I am a lawyer in the policy development division of the Ministry of the Attorney General. Our group of about 15 lawyers has responsibility for developing suggestions for justice reform. During the four or five years that I have been there I have worked on the Family Law Act, the Support and Custody Orders Enforcement Act and the recent access enforcement changes.

Also in the area of family law I had an opportunity to chair the Attorney General's Advisory Committee on Mediation in Family Law. That was a process that took about a year and a half and is probably the best consideration of mediation issues in the family law area that has taken place in Canada, possibly in North America, given the response that we have had to the report.

I have brought copies of the report with me and I understand they have been distributed. I am told by our communications department that a little more than 1,000 copies of that report have been distributed internationally. It has been very popular in the United States, and we have also received requests from as far away as Australia.

The other areas of alternative dispute resolution that I have had some exposure to include the auto insurance reforms that are under way. More recently, I am on duty assignment in Washington, DC, with the National Association of Attorneys General, which is a body that represents state attorneys general in the United States in their duties and liaison with Congress. One of the tasks that I am performing there is to assist in the editing of an ADR textbook on the use of alternative dispute resolution techniques in a number of fields in the United States.

I would say from a distance it probably appears that the United States is light years ahead of Ontario and Canada in the use of alternative dispute resolution. In fact, during the last couple of weeks that I have been down there, the House of Representatives had before it a fairly detailed piece of legislation that would mandate the use of alternative dispute resolution procedures in all federal agencies in the way that they deal with virtually any dispute that a federal agency has with any member of the public or contractors with government. This bill would mandate the use of things like mediation and conciliation as a part of resolving the dispute.

I have also noticed, however, as a part of the process down there, and I do not want to sound too critical of the American process, but I am not sure there is as much thought goes into the development of some of the policies in their process. I am not sure, for example, in the area of family law, that any state Legislature or any committee at the federal level gave consideration to family law mediation issues to the same extent that the committee did in Ontario.

I only throw that out by way of introduction because my contact with alternative dispute resolution and mediation in particular is that I have really come from a number of angles now. The only other item I would throw into the introduction is that during the course of my chairing of the advisory committee on mediation, I took the liberty of taking a course to be trained as a mediator myself to see what it was all about. An organization out of Arizona came up to Toronto and put on mediation training geared specifically to mediators in the family law area.

Having said all of that, I want to really make the rest of my comments specifically in regard to the report that was prepared by the advisory committee. That committee was organized by the Attorney General (Mr Scott) in March of 1987. The membership on it, which is shown on the signature page of the report, is fairly broad. We had representatives from the bench, for example,

Judge Van Duzer from the Unified Family Court in Hamilton. We had mediators on the committee. We had mental health professionals. We had a family law commissioner from Toronto. We had some senior family law practitioners. We had some private mediators who were nonlawyers, to make sure we did not have a bias in favour of lawyers in this field. We also had a representative from the Ontario women's directorate to make sure that the concerns that women's groups have about mediation and family law were foursquare in front of the committee members as we did our work.

So with that kind of a composition to the committee, we had as a starting point the fact that family law in Ontario already includes a mediation component. The Family Law Act provides that mediation should be available on consent. The Children's Law Reform Act provides that mediation should be available on consent. As a result of those provisions, a number of mediation facilities have sprung up around the province. There are facilities in Kingston, Hamilton and London, Ontario. There was a smaller facility in the Ottawa area.

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What we saw our role as being, as we set out to look at the possible future of mediation and family law, was to not decide whether there should be mediation in family law but rather to boil it down, if you like, into three general questions. I will pose the questions for you and then come back and address each one individually.

First, is mediation a desirable method of dispute resolution? Second, are there problems or concerns about that particular method of dispute resolution? Third, given the concerns that have been expressed about it, how should mediation in family law be delivered in Ontario?

There was no doubt that the committee concluded that mediation was a desirable method of solving problems in the family law area. If anything, it seems to be one area of legal disputes in the province where mediation has truly taken root. There is a thriving practice of private mediators in the province, both lawyers and nonlawyers. There is also the evidence of these facilities that have sprung up around the province to suggest that there certainly is a demand for mediation.

I would say our work in the committee focused more on the second question; that is, are there concerns about mediation in family law that need to be addressed? The answer there again is yes. There is no doubt about that. The concerns seem

to fall into a number of different categories; for example, as Shin Imai mentioned, is it necessarily less expensive? Is it necessarily faster than going to court? Are people happier at the end of the process?

Beyond those general concerns about the process, we moved into some that were more specific and were generally articulated for us by the groups that represent women's interests in the community. The representative from the Ontario women's directorate on the committee did a fairly exhaustive search of the literature on this subject internationally and delivered that up to the committee members. In fact, one of our very first meetings involved a presentation by the representative from the women's directorate about what the literature said and what the concerns were that women's groups had about mediation in family law.

Just by way of giving some detail on what the concerns are, they seem to fall into two categories really. The first is power imbalance. If mediation is to be this perfect negotiation between two relatively equal people assisted by an objective third party, if that is the process that we want to offer people in family law, then the two key parts of it are the relative equality in the bargaining position and the objectivity of the person who is doing the mediation.

When you look at the issue of a power imbalance from a women's perspective, you come up against two hurdles. The first is the undeniable presence of domestic violence in Canadian society. If a woman comes from a background that includes domestic violence, there is no doubt that can contribute to an unequal bargaining position. A woman who has been battered is not in a position to negotiate with the person who has done the battering.

The second part of it is something a little more general, and that is, we live in a society that has systemic bias against women and there are women, battered or not, who come out of a marriage in an unequal position, who are incapable of bargaining with their spouse. The most dramatic example of that would be, in fact, a case that I experienced when I was in practice, although it did not involve mediation.

The husband was very highly qualified in business affairs and the wife, after 30 years of marriage, had never made out a cheque and did not know what a mortgage was. To say that those two people were capable of bargaining with each other or that an objective third party could somehow balance the scales in their negotiations

would be stretching the credibility of people who are proponents of mediation.

That is one concern that was expressed to the committee on behalf of women; that is, where there is a power imbalance, whether it is brought on by domestic violence or it is brought on by systemic bias or systemic discrimination, those people are not ideal candidates for mediation.

The second concern goes to the one that I have mentioned already, which is the objectivity of the person who does the mediation. If the mediator has a particular bias, it is very easy to inject that bias into the process. As Shin has mentioned, there seems to be some suggestion that mediators favour joint custody arrangements. Joint custody in itself is not inherently evil. However, like mediation—

Mr Jackson: Boy, have you ever changed.

Mr Cochrane: No, no. I have not changed my views on that. It is not inherently evil, but I think the identification of the people who are best suited to mediation is open for debate.

There is a theory that has been put forward that joint custody at marriage breakdown should be the presumption; that should be where we begin our deliberations about how children should be handled at the time the marriage breaks down. The opposing theory is that we should really start with two people who must make a case to the court about whether or not one or the other, or both, should share custody of the child.

I think the Ministry of the Attorney General's position, throughout most of the discussions that have taken place around mediation and around the access enforcement legislation, is that joint custody in Ontario is really only suited to people who consent to that kind of arrangement and is not something that should be presumed or should be imposed on the couple at marriage breakdown.

The point here, though, is that in looking at mediation the objectivity of the mediator is critical.

On a related third point, there is the question of mediator qualifications. How do we train and how do we require people who deliver this service to have any particular educational standard or any particular ethical standard? On a business level, should they be required to carry insurance? The discussion around mediators is not unlike another issue I was involved with a couple of years ago: the paralegal concern. That is, if there is going to be a paralegal presence, what kind of educational standards should there be, should there be insurance, etc., etc. The two

areas are not dissimilar, particularly on the question of the qualifications.

In any event, with those concerns in front of the committee, we then struck out to try and find a way of addressing the concerns. I do not think there was an opinion expressed that mediation should be simply discarded because there were these concerns from women's groups, or there were these concerns about mediator qualifications, or there were shortcomings in empirical evidence around cost savings through mediation.

The focus really became: is there a way of delivering mediation in family law that addressed or lessened the concerns that were present about it? With that in mind, the committee set about developing a model mediation service that committee members felt addressed the concerns that had been expressed. The committee was not unanimous in its recommendations. There were differences of opinion that arose on a number of issues. In particular, on some of the concerns that were expressed by women's groups, we were unable to get a unanimous consensus and there are indicated in the report some differences of opinion expressed by the Ontario women's directorate, which I would be happy to answer any questions about if we have time in the question-and-answer portion.

I would say, in trying to draw to your attention the key recommendations in this report, what the committee identified as important are really the following things.

The presence of mediation in family law has been a positive development; it is a good thing. People do seem to like it. They seem to be happier after they go through the process. As Shin says, the jury is out on whether it is less expensive or whether it is faster. In the final analysis, if people are happier and more content with their agreement at the end of mediation, the other two things may become academic.

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Secondly, the model recommended by the committee is for comprehensive mediation. That is, if you were going to make mediation available through a particular structure in the province, it should be available for all issues. You should not make people just mediate custody or just mediate access or property. All of the issues should be on the table at the same time so that they are able to get a comprehensive solution to issues that face the family.

Thirdly, mediation in Ontario should not be mandatory. It is not mandatory now. The dispute resolution technique seems best suited to people who are willingly at the table requiring them to be

there and it defeats much of the purpose of generating goodwill between the spouses as they begin to negotiate with the assistance of the third party.

Probably the most significant departure from the existing regime in family law and in mediation is a recommendation that there be a procedural requirement for public legal education for the spouses. The history of how this recommendation came about is actually pretty interesting because we wondered whether or not the public understood what mediation was, if they understood what they use it for.

One of the proposals was that if you just make it mandatory and make everybody go through mediation then the public will get used to the idea of using it and that will be good for mediation. In fact, the response to that was that if people are aware of litigation or the adversarial process being available in family law, if they were equally aware of the availability of mediation and were aware of its strengths and weaknesses, then they would pick that. It is really the survival of the fittest in the marketplace. If mediation is such a good idea and people are aware of its strengths and weaknesses, then they will select it as a natural way of solving their problem.

What the committee came up with was the recommendation not that we require people to go through mediation or that we require them to go through the adversarial process but rather we require that they be taught about family law and as part of the teaching about family law they would learn what their respective rights and obligations are. They would learn about the adversarial process. They would learn about mediation and its weaknesses, if there are any, and they would learn about the weaknesses of the adversarial process, if there are any. They would learn about the costs and the delays necessary in going through either process and, having all of that information available, they would then be able to make a choice as informed consumers about which way they wanted to solve their particular problem.

Other key recommendations concern protections against spouses who come from a background that includes domestic violence. I cannot go through each one individually because there are several but the committee decided that there were a number of ways of addressing this concern about domestic violence without simply saying that if there has been an act of violence in the home, you are automatically precluded from going through mediation, although that was certainly a position that was put to the committee;

that if there was an act of violence that should be an automatic reason for denying the mediation process to a couple.

Rather than go that route, what the committee developed was a series of safeguards and protections that could be put on the process. It is not so much the act of violence that should preclude you from mediation in family law; it is the fact that you have suffered violence and that has put you in a position where you cannot bargain with your spouse.

The safeguards developed by the committee really were designed to say, "Let's identify spouses who come from a background of violence and, at each layer of the process or each step of it, let's try to screen out spouses who have been rendered incapable of negotiating with their spouse because of the violence" or for any other reason. If somebody is incapable of negotiating with their spouse but they have not suffered domestic violence, similarly, they should not be in that process either.

The committee's recommendations on domestic violence were really geared towards developing these kinds of safeguards to screen out those who would be possibly taken advantage of in mediation. If anything, the committee said that the screening process should err on the side of caution; should err on the side of ruling you out of mediation if there is any doubt about whether you are suited to it.

Other important recommendations relate to mediators providing legal advice. Even though many mediators may be lawyers, the committee felt it was important that they not be put in a position of giving legal advice to the people who were in front of them if they were to be truly objective.

That then begged the question of who were they to obtain their legal advice from? The committee makes a number of recommendations, or it recurs in a number of the recommendations, the suggestion that there should be constant reminders and suggestions that people who are using mediation go out and obtain independent legal advice before, during and after the process to ensure that any agreement that is reached with the mediator withstands a legal challenge and to make sure that it is fair.

Conclusion 37 sets out in great detail what we thought the true role of a mediator is in the process. The description, which is about 14 points long, ranges from the need for impartiality of the mediator right through to the mediator being vigilant in screening out victims of domestic violence and those who have suffered

from power imbalances within their marriage relationship.

There are recommendations related to qualifications of mediators suggesting that the associations that regulate mediators get together and develop a stringent method of educating mediators, of ensuring their ethics, of insuring their business practices, if necessary.

We also developed a recommendation for funding of these kinds of services. If the model is to be delivered province-wide, there would be a need for government assistance in funding these so we made a recommendation that funding be developed on the same methods as the legal aid clinic funding system.

There were some conclusions or recommendations that were made towards the end of our work related to the relationship between access enforcement and mediation and supervised access. We thought that if this kind of facility was going to be in the community delivering mediation services, it should also consider delivering supervised access services, which are very much related to the access enforcement issue.

That really is the best overview I can give you of the committee's recommendations in the time that I have. I see I am already 10 minutes over, but I just wanted to say by way of conclusion, if are going to think about one issue in the area of mediation and family law, you should probably think about this: It is not a question of whether mediation is going to replace completely the adversarial system in solving family law disputes.

I think, having been through this experience with the advisory committee, that the real question is, once you have made the decision to make mediation available in family law, how do you identify the right people for mediation? It is not for everyone. As I said, it is not for people who come from a background of domestic violence. It is not for people who come from a position of unequal bargaining in their marriage or relationship. It is not for everyone.

Mediation is for the right kind of person, and the debate should really be around, what is the right kind of person for mediation? Some people are better suited to the adversarial process. Some people are better suited to mediation. The question is, how do we get the public going in the direction that is best suited to their own individual needs?

The Chair: I have a question for Mr Imai, basically a contextual type of question. I basically perceive your comments to be more observations rather than propounding anything in

particular. You indicate a number of factors that should go into whether a specific alternative dispute resolution proposal or process is good or bad, etc, and you list five questions.

My problem is that does not help me, as a legislator, to decide which areas the province should or should not move into. On the other hand, Mr Cochrane has spent a lot of detailed talking about ADR in the family law context. Why are we dealing with it in the family law context in such detail and not in another context?

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In other words, to what extent should a government or a particular jurisdiction be proactive or be an actor in this whole process, as opposed to an observer? Should it just wait to see what happens and then respond to it? Should it be proactive? If you have a set of five questions as criteria, should the Ministry of the Attorney General look at every body of law or every forum for settling disputes and see whether or not those five questions should be applied to that as to whether or not we should go into the field of ADR and move away from traditional litigation?

We are trying to look at basically coming up with a public policy on ADR and we have a lot of comments on what is happening out there. We see some proactive activity in the field of family law, but what about everything else? I basically put that question to both of you. Perhaps Mr Imai could go first.

Mr Imai: I think your observation is a good one. My comments were more observation than sort of specific pushing for one thing or another. What I tried to indicate was that there are a lot of techniques and a lot of contexts and it is very difficult, at least from where I sit, to say, "We should do X." I think that what you suggested, which was to look at each area and decide in that context whether it is appropriate or not, may be a more fruitful way to proceed, as opposed to attempting to say in general, "We are for ADR and let's go and get it." I think that a general comment like that does not address the specific niches where ADR may be appropriate. In terms of the approach, the latter suggestion you had, to me, makes more sense.

The other question you had was why family mediation and family law has been looked at in some detail. Why not the other areas? There are a lot of areas out there and I cannot comment, I guess, specifically whether everything is going to be studied in the same way. I have been looking at arbitration and, as I say, there is automobile arbitration, which is going to provide

us with some information, and so on. I do not know if that answers your question.

The Chair: More or less, it does. I think that one of the things the committee wants to look at is a policy framework to deal with this whole issue. We know that things are happening out there in the system and outside the system, but we want to come to grips with exactly what is happening and whether there should be a policy framework across the board on the part of the government of Ontario to deal with it.

Mr Imai: I just recalled one other comment you made about the appropriate role of government, and even there I think it depends on the situation. Some contexts you want the government to stay out of; it is something that is appropriate for the private sector to deliver and for people to choose. In other areas, it may be important to have more direct government involvement either through legislation or just encouragement of some type. My experience, and this study Michael has done is a good example, is that until you get into it up to your elbows, it is difficult to know the exact issues. The experience in the United States is that if you do not do that first, get your hands dirty and figure out the best way to do it, you may end up blowing it.

The Chair: Do you want to comment?

Mr Cochrane: I was just going to say that I think your question is a very good one. You put your finger right on the whole issue of policy development generally in a field like this. Our job in the civil services in many cases is to react to things that happen, whether it is a private member's bill, a government's policy in a particular field or some member of the public or an association telling us to do or not do something. The sources of ideas come from a number of areas. Take a look at class action reform. We had the benefit of an exhaustive Ontario Law Reform Commission report on the subject, so policy development tended to be a little easier in a field like that. Most of the spade work has been done.

The only advantage we have right now is that alternative dispute resolution is still relatively in its infancy in Ontario. So if that kind of overview, that kind of larger justice policy approach to ADR is desirable, now is probably the time to do it so that experts and people who are committed to a particular field can get into the area the same way we did in our advisory committee with people who were doing the mediation in that area or people who were out talking to women who had concerns about

mediation so that we actually had first-hand accounts of the concerns. That is the kind of expertise that needs to be developed in each area.

Mr Jackson: First of all, Mr Imai, I appreciated your presentation. Posing questions is not a bad way of getting a lot of your concerns out on the table without indicating exactly a value system, so I very much appreciate that. However, I do want to probe further with some of your questions.

One of your first questions was, how successful? How do we get an objective quantitative measurement of that? As a legislator and a person who is not a lawyer but who has had an awful lot of personal experience in mediation, arbitration and dispute resolution in the last 20 years, predominantly in the labour sector, I have my own opinions about what that could be, but you went on to suggest reducing costs and what costs are relevant.

You come from the task force on court reform, so I have to imagine that you have really got your mind around this issue a lot more clearly than you felt you had sufficient time for today, so I am going to ask you to be a little more specific. Is the court reform commission not looking at those elements of justice which are being further denied access to a segment in Ontario? Can we say we have been able to measure that a person's custody dispute resolution is now taking three times longer than, say, a person's dispute with the local muffler shop? To what extent have you been measuring that and what information can you give us in terms of your findings?

Mr Imai: In terms of measuring how long it is going on, what we have discovered is that it has been difficult to get the statistics on that kind of thing. You can say overall, for example, that civil litigation takes so long. You get a medium point. The medium point might be 900 days for trial. Some are less, some are more and that type of thing, but that has been a problem. I think because of the difficulty in getting good statistics, it has been difficult to know exactly what is the best thing to do.

The court reform task force has a project called case management, which you may have heard about. There are three pilot projects. It involves basically getting the bar and the lawyers in that particular court involved in pushing through cases in a much tighter time schedule and then timing everything and getting those statistics you mentioned. So by the end of these, you will know. You are saying that custody takes three months and muffler shops take four months.

Mr Jackson: Let me take the second. Then there is the whole question you raised about cost-effectiveness to the extent that we are not sort of incident measuring. To what extent are we able to get a handle on the costs associated, whether it be court time, the level of legal participation, the degree to which legal aid is an essential component of access to justice for a citizen in this province? To what extent can you talk to me about those monetary aspects that you are able to—not incidence and time, but in terms of the monetary elements of it? To what extent has your court reform task force been able to get a handle on that aspect?

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Mr Imai: Again, hopefully through the case-management project, we are going to have the stats to be able to do that. The cost to the parties involves interviewing the parties and asking about the cost of the estate.

Mr Jackson: How about the cost to government, which is an entirely different focus issue? If we were to call in a forensic audit of our court systems, it would probably take two or three years, but clearly we would be able to say that we are spending a considerable amount of time with these types of cases to get this kind of a return.

An auditor, by his very nature, would be able to come to relative conclusions void of any political influence. They would do a very good job at that. We just do not have that occurring. I am trying to get a sense of that here because that moves me into the family law area and the question which the chair raised, which is why we are going into all of the areas simultaneously to get an overall philosophy, as opposed to taking a specific target. I will come back to that question when I get a chance to ask Michael some questions.

Mr Imai: Okay, with respect to the cost to the system, again, it is dependent on good statistics. I do not think that a detailed costing has been done. What you would need to get that information is to take a case and figure out, when you filed the papers, how much that was worth in terms of state time to process that, and then when the defence papers were filed, to process that; how many motions you had in a typical case, how long the motions take; whom they were in front of; the administrative burden of organizing the motion. You are hitting questions that I would be very interested in exploring and getting the results to, but at the present time I do not think that we have that detailed information.

Mr Jackson: I will not ask you the question, just what has the court reform commission been

doing?, because I know you have been doing something. But I am just trying to get a handle on the degree to which your efforts to date can be helpful to this committee, so I want to get into the third question area and the one that really disturbs me the greatest and concerns me the most. That has to do with those groups which are further being distanced from our court system, they are having less and less access to justice—minorities and poor, predominantly, and women.

Clearly, we are getting a sense of that, and I will tell you why we, as legislators, can speak with more authority than your commission. That is because on a daily basis we open our mail and get two or three letters of people's concerns, and they are written in a very human style. They are just simply saying: "I have been to court 28 times. My ex-husband is just laughing at me because he knows we have already spent \$85,000 in the court system, and he is determined to spend it all rather than share half of it with me."

I have written letters to the Attorney General, and he just writes me back to say that is the process. Clearly, each of us has cases where we see capitulation. When you talk about the rate of agreements and out-of-court settlements, we know that there is a clear linkage for the poor, for women and for minorities in terms of capitulating for a variety of reasons, but monetary is a major one. To what extent have we been able to at least get a better handle on that through the court reform task force?

The Chair: I wonder if I could interrupt you for a minute. The next witness is scheduled for 3:30, and we have four more additional questions to these particular witnesses. I just wonder if Mr McMurtry minds whether or not we extend this segment beyond the 3:30 deadline so that we can get some additional questions in, or are you pressed for time?

Mr McMurtry: I have a meeting downtown. I have to be there at five. I want to leave at quarter to five.

The Chair: Perhaps what we can do is extend it maybe 15 or 20 minutes, if necessary, beyond 3:30 so that we can get the questions in. I think that should give us enough time at the other end. Okay?

Mr Jackson: I do have a few more questions. I will try to be brief. Did you want to respond more directly?

Mr Imai: I think that Michael, through that committee, has gone through some of that process of attempting to look specifically in the family context: When is mediation desirable?

When can you avoid that situation you are talking about, of excessive litigation costs? With respect to all these areas, I wish there were easy answers to them, but unfortunately I think there are a lot of factors. When I talked about the tradeoffs with ADR, I think that is one of the concerns. In civil litigation cases maybe two per cent or three per cent or four per cent are getting to court now. Do you want to put further barriers to make it even more difficult to get before a judge?

Mr Jackson: Let me ask you this question: I do not think there is a jurisdiction in the world that has a definitive policy on ADR that transcends all areas of, for want of a better word, a conflict that requires some sort of third-party intervention or decision. If we can just refer to it as general and all-inclusive in society, I do not know of a single jurisdiction in the world that has tackled it from that perspective, which strikes at the heart of the chairman's question.

I am nervous that we may be approaching this the way we approached pay equity, which was to deal with the whole issue of pay equity. We now know we have some problems in terms of implementation because we did not focus on its cost-effectiveness, on the clients served and the most vulnerable. It became more of a policy spreadsheet of a statement. I get a sense of frustration about that and what we are about to do.

Now I move to Michael where I get a sense that the one area where the government seems on the verge of proceeding—do not forget that in five years this government has made a lot of positive comments about ADR in a variety of issue areas. I am familiar with them because of the association of arbitrators and so on who have said, "Look, we have been getting some very positive signals from Ian Scott and from the Ministry of Consumer and Commercial Relations." But in the last year the signals are not quite there. It seems that only in family mediation are we seen to be prepared to move forward, and your presentation reflects that, Michael. You do not hide that. You make that abundantly clear.

My question to you is, to what extent, if you braved just as many questions and yet you have a report that tells you there are some guidelines—how can you come to the conclusion, for example, that all items should be on the table in a family mediation situation? You say you have come to that. That must be a consensus, because I know the women's directorate and women's groups have clearly documented to your committee and to others that women are willing to trade off their monetary compensation in order for

support to gain custody. In their view it is in the best interests of the child.

There is a whole series of arguments. Of course as you know in the labour field in this province the legislation clearly allows you to separate varying matters outstanding in dispute. You can arbitrate one, mediate several others and use several mediation modes. The Labour Relations Act clearly provides that. But on something as sensitive as family law you are able to speak with clear definitiveness, that all items must be dealt with.

The Chair: I hesitate to interrupt at this point, but if we can maybe keep the response as brief as possible so that we can get some other questions in, I would appreciate it.

Mr Cochrane: It comes from a reading of the recommendation. The committee did not recommend that all issues must be on the table. It recommended that if the service is delivered, the person who sits as a mediator should be prepared to sit and deal with all the issues if that is what the couple wants. If the couple only wants to deal with custody and they do so on consent, then that is all they will deal with. But if the couple says: "We want to deal with everything at the same time because we have an exclusive possession issue, a custody issue, access, support. Possession of the matrimonial home is related to who is going to have custody, and custody is related to how the child support is going to be fixed. Then we want all of those things on the table." If that is what they consent to, then that is what the mediator will deal with. It certainly was not a recommendation that every mediation must involve all issues.

Mr Jackson: I will check Hansard because I am sorry; I got that for your presentation.

Mr Cochrane: No, I think you are right.

1530

Mr Jackson: I would like to go farther and I cannot in the interests of time. I have several more questions. Perhaps Michael is available to come back to the committee. Perhaps I can just make one brief statement. I have major concerns. Michael, you and I disagree fundamentally on family law mediation in this province.

Mr Cochrane: I do not know why you would say you disagree with me because I am here as a chairman of the committee.

The Chair: I wonder if maybe we can facilitate this issue here. Would you be available to remain here until after Mr McMurtry around 4:30?

Mr Jackson: Not necessarily today, not just for me; I can talk to Michael later, but to be available to this committee when we deal in a more focused fashion on family law. We will then have the statements from Hansard, which we can discuss directly with Michael as a policy adviser. From his credentials, it is obvious that he is on the leading edge of advising the government in these areas and I certainly would like to have access to him as a deputant, as a resource, to come back before the committee, not to hold him any later today.

The Chair: Why do we not try to get him back for that portion of our hearings. In the meantime we will go to Mr McGuinty who has some questions.

Mr McGuinty: I am not sure if this is correct. I will ask you. You may or may not wish to comment on it, Mr Imai. I was intrigued by your opening caveat which preceded your preface to your remarks, something like you see on the television shows on Sunday morning, "The views expressed are those of the individuals and do not necessarily reflect the views of the sponsor."

Mr Imai: That is better wording.

Mr McGuinty: Knowing the Attorney General, as I have for many, many years, does your ministry have a position? I enjoyed very much, and I am not saying this in any way to cast aspersions on, your very thoughtful and very enlightening commentary, but does your ministry have a position on this?

Mr Cureatz: His sponsor.

Mr McGuinty: You sponsor, that is.

Mr Imai: The sponsor; you will have to ask the sponsor directly, I think, for the sponsor's views. I think Mr Jackson has said that there is general interest in looking at that, and I think that is there. With respect to your question, "What is your ministry's position?" the difficulty is what I indicated. It is very difficult to say, "I am for ADR," or, "I am again ADR," because it is too general. I think it has to be more in the specific areas and looking at specific techniques.

Mr McGuinty: Second, your remark in passing that the evidence does not show that court congestion is alleviated in any significant way. I am curious about that. How could that be?

Mr Imai: With respect to the evidence, I would like to give another caveat. That is current literature. It is not definitive and it is open to debate. With respect to the specifics that you mention, what happens is the majority of cases are settled outside of court. If you settle things

through mediation, those may be the cases that get settled anyway, number one, so that where they would have been settled by the two lawyers or by the parties, instead they get settled by mediation so it does not affect the trial lists. Second, the experience with voluntary mediation is that the volume is not high enough that it makes a significant inroad into the court dockets.

Mr McGuinty: All right. Thank you very much.

Mr D. W. Smith: I will try to be as brief as possible. Certainly, I speak not as a lawyer, so I may not be asking the questions the way they should be. In the first place, were people concerned about judges' decisions as to why you would start thinking about these alternative dispute mechanisms or resolutions or whatever you want to call them? How did you get started into your different task forces? Were people not happy with the decisions or was it just the time that it took?

Mr Imai: Do you want to answer on the family—

Mr Cochrane: I think it is related to dissatisfaction not just with the court decision but with the process. I do not what the committee's background is on the difference between mediation and the adversarial process, but there is a completely different approach to solving a problem. The adversarial system uses what is called positional bargaining. It is one person wins something and the other person loses something.

In many cases, and this goes to the question of the ultimate decision, the ultimate decision gives almost everything to one partner and maybe nothing to the others. I think the attraction of mediation is that it is a different kind of negotiation. It offers both parties—this is not just in family law but maybe is especially demonstrable in family law: both parties may be winners. They may find out in the process of negotiation that they can both have their interests satisfied through the negotiations and do not necessarily have to lose because the other one has won something.

I say it is more of a dissatisfaction with the one-dimensional nature of the adversarial process. There is more flexibility. There is more room to move and satisfy people in a mediated context.

Mr D. W. Smith: I guess some of the people who have come through our offices, as a member—they did not sound very satisfactory to me and I really wondered what brought all this

about this in the first place, whether it is just questions that come from people to your ministry and all that. In your opinion, how many lawyers would be in favour of ADR? Have you any assessment on the bar association on that? Are they generally in favour or generally opposed to it?

Mr Cochrane: I am not aware of any surveys that have been done of the profession. It seems to be like other areas: the more lawyers know about it, the less they realize they have to fear from alternative dispute resolution. It is really just a different kind of legal service in many contexts. It is not necessarily taking work away from lawyers. I think lawyers are beginning to realize that.

Mr D. W. Smith: Over in the United States, how many would go through this process as compared to just a judge in the court or a judge and jury? Do they take 10 per cent of the number of cases in ADRs or is it 25 per cent of all the disputes over there? Do you know that?

Mr Cochrane: I do not know what the statistics are for the states but I know from the hearings that I witnessed in the House of Representatives last week that it was the American Bar Association that was speaking passionately in favour of this overall federal approach to the use of alternative dispute resolution in federal agencies.

The Chair: I would just add that tomorrow we are going to have John Kelly from the Canadian Bar Association as a witness, and of course our next witness today will probably have some comments to make on your questions as well.

Miss Nicholas: Before I ask my question, could we have Hansards a bit quicker? Could we have Hansards delivered to us because I think that the background information we have received will be really helpful and I would like to look over it again. Would that be possible?

The Chair: Yes. We will put the request in.

Miss Nicholas: Mr Imai, I have a question with regard to something you were talking about. You made reference to the percentage that is settled when you go to mediation maybe being very similar to the percentage that is settled when you go to court. Did you say something to that effect?

Mr Imai: What I was comparing was the rates of settlement at mediation compared to the rates of out-of-court settlements.

Miss Nicholas: And they were very close, those percentages.

Mr Imai: They are all over the place, actually. If I recall correctly, I think the point I was trying to make was that some mediation services, especially in family, were saying, "We have a great record because we settle 80 per cent or 85 per cent of the cases." That by itself, however, did not prove the point because 95 per cent of the cases in the litigation process settle out of court, so you could not just sort of take the rate of settlement and from there leap to the conclusion that mediation was effective. You have to look at the whole picture. I guess that is the point I was trying to make.

Miss Nicholas: Looking at that, that is what I was maybe getting to as what we should be looking at, because you said that maybe they would be afforded some of the protections that they get through the justice system. I wonder, then, if we could look at if it is better to look at the costs or the time-saving factor, not on the court system but on the individuals themselves, whereas when you go to court the settling may be on the steps to the courthouse, which may take four years to get to. You have the same percentage but the time to settlement was maybe four years—

Mr Imai: Right.

Miss Nicholas: —whereas the time in a mediation situation might be six months or a year depending on what area you are in, and so therefore the settlement might be within a period of seven or eight months as opposed to this longer duration and the costs. I am trying to grapple with where we should be focusing in that area, the advantages in the area of time or costs or that kind of relation. I really did not get a feel for it in your statement.

1540

Mr Imai: I was not indicating in any particular area what objectives should be important, but in family I think the costs to the parties is important actually, the time it takes, and I think that in the family area the process itself, the fact that it is nonadversarial and whether because of that you get better agreements, is very important. As well, because of the lack of procedural questions, perhaps you get worse agreements for women; that is something that should be considered. With each ADR technique the process that you are going, which is identifying: "What is it that we want this thing to do? What is going to be important about it?" is very important.

As I say, in commercial mediation you may have very different considerations. Maybe the fact that the insurance company and the insured

are not going to leave holding hands does not matter so much as the fact that you are going to get the thing settled sooner, so depending on the situation I think you can have different objectives.

Miss Nicholas: Just quickly, what is the time factor usually in mediation for family disputes, where there are pilot projects going on in terms of coming to some kind of mediation process.

Mr Imai: Do you have that for the court-related ones in Ontario?

Mr Cochrane: I do not have that.

Miss Nicholas: I would be interested in this because the backlog of the courts is something I think is one of the reasons we should be looking at this. I know everybody has his own reasons. I was just wondering if the time factor in the two was comparable.

Mr Imai: They have four to six sessions, usually.

Mr Cochrane: I would not want to say because I do not have the figures here in front of me.

Miss Nicholas: Is that something you could find out, though?

Mr Cochrane: I was going to say that if you want to ask the witnesses who are coming up, particularly Dr Jaffe from the London court clinic is very knowledgeable about that area. He is one of the future panelists.

Miss Nicholas: maybe we can notify him in advance that this question will be asked so that he has the appropriate material.

The Chair: Just one final question on wrapup: what and who is driving the legislation in the United States? You referred to legislation in the US Congress with respect to ADR.

Mr Cochrane: It is always difficult to tell who is driving what in that process because the ideas for policy development come from so many different sources. I would say the American Bar Association seems to definitely be supportive of it, and they have a number of associations separate from the bar association that are interested in ADR in the administrative law area. There were three or four panelists from those associations that appeared before the House of Representatives. Where the bill originated I am not sure, because in their system any individual congressman can sponsor, like a private member's bill in our process, so it is difficult to know.

The Chair: Thank you very much, Mr Cochrane and Mr Amai. I think it was very instructive for us to hear your comments and the

answers to our questions. Perhaps we will see one or both of you again before we are finished.

Mr Cochrane: I was going to say, if I am invited to return—I would be happy to do it—I do work in Washington now; I am back in the province a couple times a month, but if I can have my schedule coincide with the committee's, I would be happy to come back.

The Chair: Our next witness is William R. McMurtry, QC, who is counsel and senior partner at Blaney, McMurtry, Stapells, and is also chair of the Advocates' Society committee on ADR. We probably have about 45 minutes, Mr McMurtry, which you can use any way you want. Hopefully, you will leave some time for questions.

WILLIAM R. McMURTRY, QC

Mr McMurtry: Do not be intimidated by this. This is partly kind of what they call demonstrative evidence. That is just some of the articles on ADR that have emanated from lawyers in the last two or three years. I mean, it is a lot of—

Mr McGuinty: Is that a standard legal technique, like the law books in the outer office?

Mr McMurtry: Exactly, but do not be—I think there is about one quote.

I appreciate very much the opportunity to address you, not only as an individual who has spent—it will be 30 years this June—in the courts and other tribunals, because my entire practice has been as a civil litigant, and maybe I could be permitted a few personal observations before I say anything that can be deemed to be speaking on behalf of the Advocates' Society, of which I am a director and the chairman of its ADR committee. I guess the reason I am chairman of the ADR committee—I made the mistake of telling the president that I was particularly interested in ADR a couple of years ago, so he put me on the committee and now I am the chairman, so at least that identifies the fact that I am very interested in the, if you can call it "the phenomenon." Although I do not think it is all that recent or that much of a phenomenon, I think it is a spontaneous reaction to some very legitimate frustration with our adversarial system.

I am not at all apologetic or embarrassed at saying that when I was in law school 30 years ago, I wanted to be a litigation lawyer, some people may say naively or overly idealistically. I believed, then, that the way we treat disputes between individuals in a society, the way we govern the conduct of individuals and govern their relationships with each other is perhaps,

more than governments, more than religion, more than anything else, the true measure of where we are as a society. I have to tell you that after 30 years and considerable frustration and some reservations about the system and a concern about whether it is doing as good a job as it could, I think I believe even more strongly that that perhaps is the most significant measure of where we are as a society.

That is all by way of prefacing the fact that I think that what you are doing here actually perhaps even has greater implications than you appreciate. You are really taking a look, which I think lawyers have, among themselves, been looking at for many years and there have been a few spontaneous sort of programs and discussions, but it has been long overdue; that is, to really sit back and take a real searching, philosophical look at, how do we resolve disputes between litigants, be it family law, be it occupier's liability, be it contracts, be it products liability and all the various areas? I think it is a great mistake sometimes in focusing on one aspect, time or expense or maybe people's even saying "uncertainty."

There is a lot of very legitimate criticism. The main criticisms, I think, of the system, are, one, the expense. Sometimes it is just not accessible to people, or the person with the bigger pocketbook can sometimes get the better result, and there is an element of that. I think it would be quite wrong of me to suggest otherwise. It has always troubled me.

There is the element of delay. The system is such that by the very system—the exploration for truth, the right of discovery, the procedural delays, the pleadings, the court backlog, the access to really a very small, select group to actually hear the case—the system does breed delay, and sometimes it is the system, sometimes it is the lawyers, sometimes it is the litigants.

The third thing is, some people do not like the uncertainty. There perhaps is less uncertainty in the law than there is in any administrative tribunal, but I will come to that later, but there is some element.

The other area that I find at times very troublesome is the nature of the system itself, the adversarial system which tends to alienate people, polarize points of view. That sometimes is unfortunate. I gave up practising matrimonial law at least 20 years ago, and one of the reasons I did was, quite frankly, I was ashamed of the system. I thought the system was terrible; I thought it was the most alienating, polarizing system imaginable and I felt—there were a lot of

the people who agreed with me within the system—that somehow we were not in a position to make that many changes. There were many of us who were even doing family law back 20 years ago who were trying to figure out alternative ways rather than through the litigation process.

1550

Having said that, you still get into situations where you need the litigation process, and it is the best system. I will just give one example. I think wherever you have two reasonable human beings, it is a sin to go through the litigation system and that mediation is the only answer. But bear in mind that if you have only one reasonable person, they will be penalized in front of a mediator. They do not have a chance, and they can be abused and exploited almost, by the person who just will not bend, and there can be even more frustration. That is something you have to bear in mind. We are dealing with human beings, we are dealing with human problems.

I can think of many areas that you may look into, something like wrongful dismissal. I think there are all sorts of improvements we can do within the system without going to alternative dispute resolution. There are perhaps two quotes that stuck out and they are not even related, but I want to read them both because I want you to think about both of them because they both made me think.

One of them is a critique on the litigation system. It is by Jon Newman, who wrote something called *Rethinking Fairness: Perspectives on the Litigation Process*. He stated:

"For decades critics of the litigation system have bemoaned the delays and costs of courtroom encounters while working mightily to refine the system in ways that make it even slower and more expensive. This paradoxical approach reflects the strengths and weaknesses of legal training.

"Skilful in analysis and advocacy, lawyers have recognized those aspects of trial procedure that can be changed to increase the likelihood of achieving better results and then engrafted well-intentioned changes on to an already complex system. At the same time, lawyers' preoccupation with results and their inadequate appreciation of the need to evaluate the system in which they function cause them to ignore the adverse consequences of the litigation process they have constructed. They know that the system is slow and costly, but they fail to recognize that the solutions they have developed over the years are a large part of the problem."

That just happens to be very true and we see it all the time. That is not to say that the system does not have a lot to be said for it, and in certain very, very basic cases, it is probably the best system that has ever been devised. But it is not the most successful in terms of money, and it sometimes is frustrating in terms of delay.

John Robinette made a statement in the Lawyers' Weekly back in 1983 that I remember noting at the time and it is so true, "In the last analysis, the administration of justice is done by people, and it is the character and quality of the people, whether they be judges or advocates, which are the controlling factors."

Quite frankly, that is what it is really all about; nothing more, nothing less. I find that if I know the person on the other side often as to whether or not a case can be settled before I even know what the case is or what the issues are. I think that one of the main thrusts that we should be making as a society is maybe an education, not only of the people but going back to the law schools and maybe even beyond the law schools.

The adversarial system, which is based on the premise that by having a very good advocate to present one point of view against a very good advocate to present another point of view, some people talk about the illumination that the sparks cause or some people just say that somehow it creates a better way of appreciating the truth. It can work that way. Sometimes it does.

But sometimes that preoccupation with being an adversary works against the system. I like to think that any good adversary, because it has certainly been my experience—you have to have an ego to be in this business, but I do not feel second to anybody as far as going into courtroom door—but I am more proud of the fact that less than one per cent of my cases go to court, and I do not lose many.

I feel, though, every time I go to court that perhaps I have lost, just because I am in court. But sometimes you cannot help it. Sometimes it is the other lawyer, sometimes it is yourself or your own client or sometimes it is a novel point of law that you just cannot agree on. Sometimes there is just a very honest dispute on the facts.

But anything that you can do to a system to force settlements is good for the system. I do not think any justice is necessarily served when you have to impose a third person's view on a set of facts. I have actually gone away from cases where I was saddened because I got too good a result, literally; where I have seen a family dispute over something and you have tried to settle it and you had a settlement, you thought,

worked out, and you go to court and you get twice as much as you would have settled for. My client may be delirious, but believe it or not, I am not. I sometimes think that justice has not been served.

One of the true geniuses of the system is the fact that by its very nature, it is not much fun to go into court and be cross-examined. It is not much fun to have that uncertainty of having a judge make a final decision which might be catastrophic. The whole weight of that system forces people to take a long second and third look at their position, and they tend to resolve.

I think if you actually analyse it—I have never done it. I do not know what the statistics are. They said it was 95 per cent. I would be very surprised if it is not much higher than 95 per cent of your cases that are settled. It is much higher if you take the cases where you do not even issue a writ, where lawyers start arguing with each other and there are letters. But out of the cases where writs are actually issued, I think you will find it is much closer to 97 per cent, 98 per cent that are settled. I would be very surprised. But that again is just an impression I have, although I thought it was a very fair balance, both the parts I heard. I did not hear it all. I thought it was a very, very fair assessment of some of the problems.

Excuse me, I am just going to get a glass of water.

I had the opportunity to have a fairly lengthy telephone conversation with your chairman, and as I mentioned to him, I was quite glad to hear that you were taking a look at this whole phenomenon because I think the more people look at this, the more they may start to rethink our whole system of law and also appreciate what is good about our system, along with what is bad and what should be reformed. I am afraid that we as lawyers have not done a very good job in selling the system and certainly there is enormous ignorance out there as to what value—let me just give one example.

Often people talk about, why do we even have lawsuits over so many of these issues if somebody gets hurt, and he sues somebody and there is a lawsuit and there is time and delay and expense, and he may win or he may lose? People can always point to an individual case and say, "Well, that wasn't exactly great" or "They got too much," or "They got too little." Why do we not just wipe it all out and any time someone gets hurt we will just figure out a way of the government paying them maybe a portion of their losses and nobody sues anybody?

As I said earlier, way back when I was a law student, I actually thought it was pretty important that society held us all accountable for our actions and what we did and our conduct towards others, that if we did something that caused harm or a loss to somebody else, we would be held accountable. Being part of this system which defines what those relationships are, I thought, was important.

You can take one example. The common law, by its very nature, is a very dynamic institution. It is flexible, it is growing, it is never the same from one year to the next, because every time you have a set of circumstances which a judge looks at, he is applying certain basic, fundamental principles that our society believes in. They evolve, and therefore you have situations where the law of contract evolves beyond the relationship just between two people.

So someone has a snail in a bottle, and they make fun of the fact that—sure, it is all very academic to talk about the fact that it went to the House of Lords over some case involving about 50 pounds, but basically it was a very important concept. That was that the conduct of a manufacturer—it was not enough that he only had a contract with the person he supplied, and the person who bought from the retailer—if the retailer could show there was an opaque bottle and there is nothing he could have done to prevent the loss, and the person who bought the substance suffered the loss and that person had no privity of contract with the manufacturer, then there was no case.

Well, as Lord Wright and the rest of the House of Lords found, they went back to some very basic principles and basically assessed liability on the fact that someone, by his conduct, has to have some reasonable foreseeability of whom he may hurt, and that whole definition of who is your neighbour. That influenced every product's liability, every good that is now sold in the market. We may have saved—at a conservative estimate, you are probably talking \$100 billion; that is very conservative—just because of the product's liability, the fact that you could not hide behind—and you evolve into these areas.

1600

You talk about something like host liability. There are a lot of complaints. You will hear the hotel people talking about: "God, we can get sued now because someone gets drunk in our hotel. Isn't this terrible?" Yes, it is terrible. There are probably 500 people alive today who would not be alive if three years ago there was not liability found on a hotel. I am not saying they

will catch everyone, but all of a sudden everyone is thinking about it because he may get sued. Everybody who has a party at his house—it is an awful thing to have to tell good old Fred: "I don't want you to drink any more. You may get hurt." All of a sudden, you realize, if he gets—

Mr McGuinty: Good old Dalton.

Mr McMurtry: No, I know. I was careful not to say it.

Mr Furlong: It applies anyway.

Mr McMurtry: You are good old Dalton too. I know you would never have too much.

But that is a very important thing in society. The minute you all of a sudden say you are not going to analyse conduct, then we are no longer accountable, and I, quite frankly, do not want to live in a society where nobody is really accountable. As I have heard in New Zealand, where all of a sudden they have wiped out a lot of these things, there is a tremendous drain even on the hospitals and the medical facilities because it is all very well to say that people will do the right thing regardless, but quite frankly, we are all a bit lazy and we all do not really pay that much attention.

There is also the deterrent value, just the fact that you will be sued, even if you have insurance. There is also the fact that if you have insurance, believe me, the insurance company is going to go around checking your premises and taking all sorts of precautions to see that the chances of your getting sued are lessened, because it has to pay. There is also the fact that there is an educational factor, because it may be very, very expensive to establish a precedent, but once the precedent is established, the entire environment or society is perhaps safer for everybody.

That is just one personal aside about the sort of things that you should be thinking about. I think that any experienced litigant will be the first to admit that there are shortcomings with our system and we should improve it. I think that any intelligent litigant would realize that this phenomenon, if you call it that, of ADR, is a spontaneous evolution of a lot of people who are, quite frankly, frustrated with the system. It is either too expensive or too time-consuming, and they are looking for better ways. The interesting thing is that when they come up with some of these better ways, they are really not that much better. But some are, and I think we can learn.

I, for one, believe you can do more within our system to improve it than outside it. I will give one example. I really believe that if you can force an early settlement, that is the best possible thing. Apart from keeping people out of the

courts and not cluttering up the cases, it is just better that two people walk away, even reluctantly, but both having accepted the result.

We made an innovation some years ago, which on the one hand, was a good thing and on the other hand, it has turned out to have been a bad thing, towards early settlement, and that was the pre-trial conferences. I hope I do not bore some of those who are very familiar with the litigation process, but I hope the others will stay with me.

When you start a lawsuit, you deliver your pleadings. You basically give a short, succinct statement of what your case is all about, and they give a short statement as to what their defence is. Then you go into the discovery process, and this can be live interrogatories which can go over days where you ask questions and you find out everything you can about the other person's case. You have a right to examine all their documents. Then you set the thing down for trial and then you wait a few months and you have what is called a pre-trial conference. Then you go in front of a judge and he just gets a very sketchy outline and you have between a half an hour to an hour and a half. If it is a really huge, monster case, he may give you a full day, but usually it is a very abbreviated hearing. He gives his impressions, and often it helps, and one side or the other will change its view because of the judge's impressions, and they settle.

That has led to a lot of settlements at that stage. The difficulty is that now most litigants do not want to settle until they get to at least that stage. Years ago, before we had the pre-trial, we would often settle partway through the discoveries because we would realize there is nothing really new going to happen after discoveries until we actually went to trial. That was the time we settled. Now that is not the case. Now we are settling at pre-trial, sometimes a year or a year and a half later.

I think with just a few ingenious amendments whereby you can force early pre-trials, even before discovery, forcing people to go in front of a judge, it would be amazing how many cases could get settled, particularly some of the routine cases that have no reason to be dragged out.

You can get a wrongful dismissal case, any experienced commercial lawyer can take a look at the pleadings, can hear five minutes from each side as to what the case is about and he will tell you with some accuracy probably what the result will be. If you had an early pre-trial where a judge did that and sealed his views, and if he was putting pressure on one side to settle earlier and

he just sealed it in an envelope and the judge after hearing the trial could read it, could see that the litigation was really the fault of one party more than the other and he could impose some serious cost consequences, you would find an awful lot of cases settling a lot faster.

There are a lot of things that can be done within the system to make it better without throwing out the system. The system has evolved over 500 years and that is why I say, the curse of the system is what that critic mentioned about the fact that lawyers very carefully and methodically have tried to make it better and better and better until it becomes a kind of cumbersome vehicle that we all have to ride and, in a lot of cases, we should not have to take the trip on something so complex. I think that is an area.

As I say, with the amount of thoughts people have on this subject, you can go on and on. There were some other comments I was going to make but before I open it to questions, because I think quite often we can learn more with a dialogue than someone giving a monologue, the final point I would like to make is I think you might be surprised how many litigants like myself, particularly in the Advocates' Society, particularly among the board of directors and people who give a lot of our time to just trying to make the system better, maybe not very successfully, believe that there is a lot of good in the system and would like to see it better. We are very interested in good initiatives that actually provide a better method of resolving disputes.

We have all had a lot of experience with tribunals, forms of mediation, arbitration and the courts and I think perhaps more than anybody, we know what is wrong with the present system. We also know what is right with it. I had a meeting of my committee and it is the only time the entire committee has shown up for lunch. We met for about two hours and, unanimously, two things came out of the meeting.

One, they were quite enthusiastic about the fact that you were taking the in-depth view that the chairman told me that you wanted to, in terms of getting a very good overview, actually stepping back and taking a look at the whole process of dispute resolution, not just outside the system but within the system. They thought, as I do, that was a very healthy thing and something that should have been done long ago rather than just piecemeal. We are constantly tampering with the system, making a few corrections here and there, but perhaps it needs a good overview.

Two, they unanimously wanted to make available to you any resources that we have, apart

from the studies. There is an awful lot more than this. I just put what I could get in my bag. They would like to have a more focused presentation on certain areas. I think that you might find that useful.

One of the things I was thinking myself is I would like to prepare a questionnaire for all the advocates. We have a few thousand members across the province who do litigation, and I would like to get their views on all the tribunals. We should identify them. There are over 100 tribunals that have been spun off over the years, as you know, with the government and with a lot of them, as Robinette says, it comes down to basically how good the people are who are running them.

In some cases, as a result of—well, let's call it, some people are just in their position because of politics. In many cases, they are very good people. They are as good as any judge and perhaps are better than some lawyers because they bring a certain fresh approach.

One of the things I would like to do is maybe canvass our membership to find out which tribunals they feel work very well or they feel have good hearings and a good process and which ones, quite frankly, they do not think work. I do not know if that would be useful. But there are a lot of areas where we would like to be involved and we would like to maintain the dialogue and we are supportive to the initiative.

If there are any questions you may have—I am sorry I did not come with any formal presentation because it was just too broad a subject and I did not know where I would even start to focus. I wonder if there are any questions.

1610

The Chair: If I might just ask a contextual-type question to start with, then Mr McGuinty and Mr Furlong have some questions.

I appreciated the fact that you began your remarks in a philosophical context and you indicated that we have to look at the legal system as a measure of where we are as a society. You referred to Robinette and quoted him as looking at the character and quality of the people in the system to determine.

That, to me, puts it in a long-term philosophical context. Not totally facetiously, but when we go back to recorded history, we see that people had trial by battle and then we evolved into a more civilized state, trial by the adversarial system. Now we tend to see something happening out there that we are trying to come to grips with. People are moving more towards trial or

resolution by consensus and agreement as opposed to the adversarial.

At the same time, you are trying to I guess underline the fact that people have to be accountable. Are you looking at the liability question? Again maybe I am concluding incorrectly, but presumably what you are saying is that the system has to capture those people who are fairminded and want to resolve; in other words, where you do not have one or two unreasonable people, the system has to capture them and put them into a process whereby they can resolve it without going through the cumbersome and/or expensive litigation system. Is that part of what you are saying?

Mr McMurtry: That is very much part of what I am saying. It is one of the frustrations I have because it takes two, often, and it is sometimes very frustrating if you do not have both sides, but even where you do have both sides, the system itself can be frustrating.

But I think that is a valid point. I think your historical reference is very valid. The more we can move away from that adversarial posture, I think, the better it is for society. But I also mention that rather than having people out there shooting each other—and believe me, it has been my experience that people will lie over money, they will kill over property and they go crazy over children. There will always be conflicts in society and you will have to always recognize that there will be people, whether you want them to or not, who will be taking adversarial positions.

I think one of the great functions of a lawyer, one of the great justifications for even being a lawyer, is to somehow kind of defuse wherever possible that adversarial system. My role is not to take my client's hate and venom and adversarial instincts against my opponent; my role is kind of like a sacred trust. I listen to my clients and I have to have some empathy. I have to understand their point of view. Then I have to accept that point of view as best I can, and a lot of my best work may very well be persuading them to change their point of view, quite frankly.

But having established what that point of view is, my job is to best present their point of view and that is all, not necessarily to destroy somebody else. It does go back to education. It bothers me that everything I learned about what I think makes a good trial lawyer or what my role should be, I learned from my father, not from a law school. I did not learn anything from the law school or anything to do with attitudes or ethics. Really, to me, it was a great disappointment how

little philosophical content there was in terms of what it is all about. What is the point of it all? What are we trying to do?

Mr Cureatz: I have a supplementary. I know you have a list but it is right on the point.

The Chair: There are Messrs McGuinty, Furlong, Jackson and Cureatz. We have roughly about 20 minutes left, so that makes five minutes each. With Mr McGuinty's permission, maybe Mr Cureatz can follow up and take his five minutes now.

Mr McGuinty: He referred to a supplementary. That implies there was a prior question. What was it?

Mr Cureatz: It was the chairman who asked the question.

The Chair: We will take it out of his time.

Mr Cureatz: It will be very quick.

Mr McGuinty: You do not have a list then.

Mr McMurtry: I will stay an extra two minutes.

Mr McGuinty: Do you have a list?

The Chair: I do have a list.

Mr McGuinty: You are not following it.

Mr Cureatz: I would like to ask the witness—the honourable new member over there gets his feathers all in a ruffle. Of course when you are around long enough, you can intervene any time you want. Another 12 years from now, you can just jump in whenever you want to.

The Chair: Mr McGuinty, he is asking a supplementary, but we are taking it off his five minutes.

Mr Cureatz: Is there any impetus for those reasonable people to try to get in front of some kind of alternative forum? I am trying to envision something, shortness of time, probably money. In your experience, which is far broader in litigation than I ever had or probably ever will, what can you do to drive them together?

Mr McMurtry: That is where I think a very heavy onus falls on the lawyer. I was retained on an estate case last Tuesday, where the deceased died a week ago last Saturday. Two hours before the funeral the will was presented, and it had changed the 50-50 distribution to 75-25 between two close relatives, and you were not talking about a big estate, about \$250,000.

I just arranged to do some investigations to build a good prima facie case of testamentary capacity and undue influence, and the person who had the new will was trying to get in touch with his brother over the thing. I said, "Look,

you tell him to show up with his lawyer in my office at such-and-such a time." I basically could tell what probably would happen if this thing went to court.

I just impressed upon them that I could guarantee them that \$100,000 would be spent determining the issue of undue influence and testamentary capacity, and this person would probably lose. I kind of dictated what I thought was very fair, which I had to force my own client to accept as a slight compromise, and said, "You either settle on this basis or we do not settle. It is as far as we are going," and we settled. It is settled now, it is going through and it is an independent person's executor and it will be—

Mr Cureatz: So, it is almost instructing the lawyers.

Mr McMurtry: You are damned right, it is.

Mr D. W. Smith: I am glad to hear that.

Mr McMurtry: No. I mean, that is part of it. They have got to realize that there is an alternative to this group resolution. I ran up against it 20 years ago with innovative counsel who wanted to reach a satisfactory result. I could not have done that in this case, if the lawyer on the other side had not seen that I was right and wanted to do what was right.

Mr Cureatz: Knowing the legal fraternity somewhat as I do, that would mean legislative process due in alternative disputes form, so that the lawyers are forced then somehow to get into that area. I do not know.

Mr McMurtry: This is tough. This is really tough. You cannot deny people access to the courts as a final arbitrator in some cases. There are certain things that perhaps are best out of the courts. But believe me, if someone has been fraudulent or is lying or you have a really, really tough issue to prove in terms of factual evidence, you really need the system.

I mean, it could be streamlined a bit, but you really need that full discovery, that full production of all documents and that objective hearing. And where you draw the line and impose, it is a bit of a copout, but I do go back to what Mr Robinette said, "In the final analysis, the system is really based on sort of the quality and character of the people carrying it out."

But part of that is education and making a stream available for people who want to avail themselves of it, making it more available. As I say, that one example—I will be specific. Allow for a pre-trial on the instigation of either party; it does not have to be both. Right after pleadings, he can insist on a pre-trial in front of a judge, and

the other lawyer can stonewall all he wants and make all sorts of wild statements.

Say, for example, I was representing the person who wanted a pre-trial and I just had a suspicion these people were stonewalling us and giving us a hard time, forcing us to take an unfavourable settlement, because I represent someone who has been fired, who needs money and they owe him an absolute minimum of six to nine months, maybe even a year, and they are sort of stonewalling, offering three months to settle it.

If I made it clear that I would take a certain figure and I know that after trial they are not going to get any less than that and that judge writes it down and seals it and we go to trial, the chances are I will probably get nine months. I have had to go three years with somebody who has no money, who otherwise is forced to take three months to survive, and then I would give the judge the power to put the costs against the lawyer.

1620

Mr Jackson: Right on.

Mr McMurtry: I mean, there are some things I would do.

The Chair: Mr McGuinty, please.

Mr Cureatz: Is this the first question the Liberals have, that kind of question?

Mr McGuinty: I want to make a comment, and then I will get to a question, Mr McMurtry. I want to make it very clear to my colleagues I do not know Mr McMurtry. He does not live in my riding, although I can get me an address for election purposes.

Notwithstanding your aspersions on my party habits, I follow my grandfather's advice: I never drink unless I am with somebody or alone. You have really, really, really struck a responsive cord in an area that I had been very much concerned with while I was a—I am unemployed now, but for 31 years I was a university professor and I taught a lot of lawyers.

Mr Cureatz: You will be unemployed after the next election.

Mr McGuinty: I taught a lot of lawyers in days when an undergraduate course was not an amorphous collection of unrelated things, as they are at the present time. And as I have often told my colleagues and my six sons—I am having great difficulty with four of them, who are criminal lawyers—I see in these boys and in their generation a group of people trained not in the profession of law but in the trade of law.

Mr McMurtry: That is exactly correct.

Mr McGuinty: They do not have a grasp of underlying principles. In fact, one of my boys became so frustrated. When he raised this question at law school, it was completely futile. He was hooted aside by the smart-ass professors. When he started to practise law—and he was not brilliant—he worked with Don Bayne at Bayne, McCann, Sellar, Boxall in Ottawa. He became so frustrated, he threw in the towel and he has gone to the Ivory Coast in Africa as a volunteer for a couple of years to get his bearings.

I am going to get the record of this and have it as required reading for them. First of all, your opening remark that the degree to which the society is civilized is really reflected in the access that people have to due process. I think you are familiar with a couple of works. If you were my student, I would assign them: Robert Maynard Hutchins, *The Higher Learning in America*, written 35 years ago, in which he laments the fact of vocationalism as having sounded the death-knell of professionalism in both law and medical schools; also Thomas More, *A Man for all Seasons*. I gave my sons a large, Holbein portrait of Thomas More for their board room. When a client comes in and asks who it is, if he is Protestant, they say it is Martin Luther; if he is Catholic, they admit it is St Thomas More.

I was very, very much impressed, and I am going through today perhaps what your father had to endure with you, because, frankly, they have learned nothing in law school. I have one smart-ass who has his civil degree from McGill, his common law degree from Ottawa and is at the New York state bar. And as far as having a grasp of underlying principles, I see this from time to time. I argue very frequently with a very dear friend of mine, and his view of law is—I say, "What is the basis of law?" I happen to think that there is a divine law, there is a natural law and that human positive law is in some way a reflection of the two foregoing. His view is that: "Well, you hold your finger to the wind and see which way it is blowing, just like politicians do, and then respond accordingly. What is obscene in Pembroke is not obscene in Toronto." We argue this frequently. This man happens to be a Supreme Court judge.

I am so pessimistic when I think of this and I experience it from day to day, and it comes to the fore now and again. You had a fine letter, for example, in the *Globe and Mail* a while back raising the question as to whether or not the Supreme Court is really qualified to consider the

moral and ethical implications of the abortion issue; Justice Wilson, for example.

First of all, I commend you. You are a ray of sunlight, a glimmer of hope. I am going to have the transcript of what you have said here as imposed reading upon my sons. I will make them write an exam on it or I will settle their mortgages, demanding immediate payment.

A few years ago—I do not recall the professor's name, but I have it in my research. He instituted a course in legal ethics at Osgoode Hall which was voluntary and it was avoided in droves. What the kids do now, they go in, and of course the professors are tapped and taped, and they follow the line of least resistance and take the course that will give them the highest grades, and the asses who are making the judgements for admission simplify their task by going on grades alone, almost exclusively.

Do you see any hope in this? I have seen it get progressively worse in my professional experience of over 35 or 40 years. Do you think the pendulum is going to swing and we are going to get back to some concern for the fundamental principles one must have a grasp of if he is really going to practise the profession of law and not simply master the skills of the trade?

Mr McMurtry: I think those are really valid comments. What you have said has troubled me for many years. There is no panacea for it. I think all you can do when you see a trend and you can identify it, you either agree with it or you disagree with it, and if you disagree with it, you can do whatever you can to move in the other direction. It is not that you are going to make it perfect. I do not want to capitulate to those who treat law as a trade, but—

Mr McGuinty: Does the bar society ever address this? Who is thinking about this?

Mr McMurtry: I think there is more blatant idealism among practitioners at the bar than even some of them will admit to, because they sort of maybe feel they look naïve or this or that, but there are also a lot of people who really do not care that much. I think that there is hope for improving the climate, but if you do not educate them, you do not have any hope.

Mr McGuinty: I am really delighted at your remark. It is invigorating, stimulating and encouraging.

The Chair: Mr Furlong, did you have some questions?

Mr Furlong: I am not sure whether I should ask them now.

Mr McGuinty: What the hell is that supposed to mean?

Mr Furlong: I would like you to sort of expand further on some of the suggestions you had with reforming the existing system. You commented on the previous presenter's statement about 95 per cent of the cases getting settled, and at what level they get settled. Do you have, or does the Advocates' Society have any statistics to indicate at which level these cases are settled?

Mr McMurtry: No.

Mr McGuinty: It strikes me that part of the problems with lawyers is that even though we are prompting our clients to settle, there is always this tendency to wait until you get to the courtroom door and then you do it. As a result you have these long lists that do not need to be that long.

Mr McMurtry: That raises two very interesting points. In direct answer to your first question, I am not aware of any statistics assessing the time. I do not think anyone has ever asked me, in any case I have ever had, when it was settled, so I do not think anyone has accurate statistics.

The point you raise is a very good one, but I think it brings into focus something else. You made the comment that we all, as lawyers, tend to wait until the courtroom door to settle our cases. That is very accurate, but it is not because we are waiting until the courtroom door to settle our cases. It is because we do not think about our cases really until we get to the courtroom door. We do not really know our cases until we get to the courtroom door. The system is like that.

You get to know your case better and better as it goes along, and the pressure of going to court forces you—you know what it is like. You are up until two in the morning reading transcripts and reading the law and you are up at six interviewing witnesses and you have a crash course, and all of a sudden you really know your case. All of a sudden, your client is really frightened you might lose. Both sides are in the same position for the first time. Both sides know and understand, because you really know the other side's case by that time and you are telling you client, "Look, we have to worry about this, and we have to worry about that, and so-and-so is going to give evidence," and lo and behold, nine out of 10 cases, higher than that, settle in the time they are called and put on the ready list to be tried in the next two or three weeks, and they actually get called.

That is a very revealing statistic, and it is not a conscious decision that people will not settle to

the courtroom door. It is because the process and procedure is such that both sides are not forced to really take a hard look at their case until they get to the courtroom door. That is why I would say some early pre-trial systems would work.

Mr Furlong: But I would have thought, and it was my understanding, that the pre-trial process was designed to do that, to settle on pre-trial so that you get yourself off the list and then we can proceed and speed up the process.

Mr McMurtry: All right. You get your client and you cannot settle, so you issue a writ, and you issue your statement of claim, and they put a defence, and you have interlocutory motions and you have discovery and you have your documents. You go on and you have finished all of that, you put it on the list for trial and, on the average, it is about two years that you go through that—at least a year and sometimes three years until you get to that stage. But on the average, it is about two years on a heavy case before you get listed.

Then it is six months after that that you have a pre-trial. So two and a half years goes by before you have a pre-trial. True, a lot of cases settle after the pre-trial, but if you had a pre-trial even before discovery, it would not work in some cases. It would be pointless because you sometimes need the discovery to find out more about the case. But whether it is 50 per cent of the cases, 80 per cent of them or even 30 per cent, you do know enough, if you really put your minds to it, both sides, prior to discovery, to at least go in front of a judge and give him a good outline as to what the case is about. That is not available now.

Mr Furlong: Based on your experience, do you feel that some form of alternate dispute resolution would work if you had one client or one party that would not agree to the process?

Mr McMurtry: What you would end up with, you would have to have the process with all sorts of rules forcing discovery. You would be back into the court process, almost, because one of the problems is, the court process is a gradual evolution of a system that tries to predict every single problem that can arise, assuming someone is being obstructive, not being forthright in his answers and not giving your documents, or not doing a lot of things.

So you have all of these built-in procedures. That is what people talk about with the protection of the court system. That is what it is. You have

all of these rules available to you to force disclosure, to force production, to really find out what the case is all about, and it is a slow, cumbersome procedure.

Now, if you have two people who are quite agreeable at the beginning and will sit down, and their lawyers are such that you sit down and, before you even discovered, you exchange documents and you have a frank discussion about the case, you can usually settle. If you have one party who is going to take advantage of mediation or arbitration and who does not give a forthright reply to any discovery or does not produce his documents in a timely way, then he will take advantage of it and the other person will be at a real disadvantage and he will not have the court system to go through. That is the thing you have to be concerned about.

Mr Furlong: I can appreciate it. I can recall and you mentioned earlier about the lawyers being involved and the type of good lawyers, or the lawyers, at least, who are able to negotiate or to resolve things reasonably would help the case. Those comments were made about what we learned in law school. Not too long ago, a few years ago, I do not know what group put it on, but I attended a program called *The Art of Negotiating*. It was put on by the Law Society, I think, and it was an American program that was put on film. It was quite revealing to most of the lawyers in the audience because they related to different parties who were in that skit. I think it should be mandatory for most lawyers because I think that is part of the process, if you can negotiate. Negotiation means also talking to your client, you suggested, to make sure he or she understands the case.

Mr McMurtry: I think some of the most effective things you can do as a lawyer is persuading a client when he is wrong.

The Chair: I do not see any other questions, so I want to thank Mr McMurtry for coming and sharing his ideas and comments with us. I think they were very helpful to us.

Mr Jackson: Thanks for staying that extra 10 minutes.

The Chair: Yes, for sure. We apologize for keeping you later than anticipated.

The committee is adjourned for today until 10 o'clock tomorrow morning.

The committee adjourned, at 1633.

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Legislative Assembly of Ontario

Standing Committee on Administration of Justice
Alternative Dispute Resolution



Second Session, 34th Parliament
Tuesday 13 February 1990

Speaker: Honourable Hugh A. Edighoffer
Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday 13 February 1990

The committee met at 1012 in room 228.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: I would like to start the proceedings of the standing committee on administration of justice dealing with hearings into alternative dispute resolution. The first witness today is John Kelly, partner in the firm of Blaney, McMurtry, Stapells, and a member of the Canadian Bar Association's task force on alternative dispute resolution. Mr Kelly, would you proceed please.

CANADIAN BAR ASSOCIATION

Mr Kelly: It is my understanding that this is an introductory stage in terms of describing a dispute resolution and how it has been applied and may be applied in Canada, particularly with reference to the United States experience to date.

What I thought I would do is take you through, first of all, some of the observations that have been made on what we see as major impediments to the use of dispute resolution and then run through some of the reasons why we think, particularly on behalf of the Canadian Bar Association, that governments, both at the provincial and federal levels, should be giving a great deal more time and attention to these methods of resolving disputes. I think you will see that, notwithstanding some of the shortcomings which have been evident in the past, if the proper amount of time and effort is put into this type of dispute resolution, substantial savings can be realized as well as much more satisfactory results for the people involved.

It is interesting that Clarence Darrow once made a comment that was one of the founding comments in favour of dispute resolution. He said, describing a businessman's view of lawyers and courts, "Instinctively businessmen seek to avoid lawyers, judges, and any building that is decorated with a blind woman holding a set of scales in one hand." I think that universally that is true. What people tend to forget is that representatives of substantial corporations really have no interest at all in being parties to the traditional judicial process. What they want is their dispute resolved in the most cost-efficient method and, in many cases, not necessarily solely with a view to winning a dispute.

It has often been my experience as counsel for these corporations that by the time the matter gets to trial, you have gone through 10 different representatives of the corporation. They are no longer there, they have no interest in dealing with it. What they want to do is get it off their desk. If you add to that the amount of time, person-hours, expended in trying to review and resolve the problem, you have tremendous delay and expense.

Juxtaposed to the business perspective of resolving disputes, you have the legal perspective. Most lawyers, I think it is fair to say, as of two years ago in any event, who were unfamiliar with these various forms of dispute resolution took the view that it was some kind of Communist plot to take away their God-given right to make a living. The reason they say that is that most of us, including myself, have been trained in a specific method of dispute resolution known as adjudication in the court. That involves a highly structured system of training which involves statements of claim, statements of defence, examinations for discovery, pre-trial hearings and trials.

There are those cynics among us who say that this is a method designed to ensure a certain income stream to our profession. There are, of course, historical reasons for doing it this way. I think what we are learning, however, is that there are much more expeditious ways of getting the information before the parties in order that they can make a reasoned resolution of the dispute without waiting five, six or seven years to have their disputes resolved, which is in fact the case.

The movement towards dispute resolution in North America really emanated from the Civil Rights Act in the United States. As a result of the passing of that legislation, there was a tremendous increase in the number of persons coming before the courts to resolve their disputes. The strain that was placed on the system is not at all dissimilar to what you hear about every day and what the Attorney General (Mr Scott) has to respond to, it seems to me, every week in the newspaper, but of course on a much larger level. The result of all that was the creation of what is known as the standing committee on dispute resolution in the United States, which is much more advanced than what we in the Canadian bar

have been able to achieve at this stage. We are moving in that direction, but they have a highly sophisticated collection of people who have dedicated thousands of hours to not only educating the profession but the public at large on how to use various methods of dispute resolution.

One of the common perceptions is that dispute resolution reduces court congestion, and there is a great debate about this. The statistics in the United States suggest that this may not be the case because ultimately about five per cent of the cases that enter the system actually proceed to trial. But what everybody forgets is that once you issue a claim, that action sits in the court system until it is finally disposed of, by a pre-trial, a show-cause hearing or the ultimate trial itself. Most people will settle cases on the eve of trial unless somebody takes an affirmative position to say, "Let's sit down and resolve this problem," which is why we now have the committee on court reform consisting of the Canadian Bar Association, the various interest groups, the Advocates' Society and others to try to speed up that process. If you could effectively use dispute resolution techniques right from the beginning of the process, you might well reduce substantially the cost of administering those very files that sit in that court system and require provincial court staff, lawyers and secretaries to be paid to deal with them, etc.

Let me just give you some statistics, which are now about a year and a half out of date, to give you an idea of the degree of involvement in dispute resolution in the United States. By 1986, there were more than 350 mediation programs in operation. There are in excess of 20,000 community mediators practising. More than 20 states have specific dispute resolution statutes. Over 120 state bar associations have established committees on dispute resolution; 18 state and 10 federal district courts have instituted mandatory court-annexed arbitration programs where people were forced to resolve their disputes in this way; 20 state legislatures have enacted laws requiring the promotion or funding of these resolution procedures; 16 federal judges and over 100 state judges have integrated dispute resolution techniques into their procedures. Interestingly, 360 of the Fortune 500 corporations have committed themselves to a form of dispute resolution prior to proceeding to litigation.

Approximately 108 law schools now offer courses, clinics and programs in dispute resolution. Over 1,000 attorneys are offering services relating to mediation in child custody and other

matters. There are at least 10, and probably by now, I would think, about 20 major US law firms which have created departments that specialize in negotiation, arbitration and mediation as an additional service to their clients. In many cases, these methods of dispute resolution will run concurrently with the litigation. If two parties are suing each other, at the very same time, in some of these firms, they have separate partners who are operating at a different level trying to resolve the matter by negotiation, mediation or arbitration.

The real question is, what is the end result of all this? So far in Canada, I think it is fair to say, notwithstanding the plethora of community-based organizations, papers presented and materials distributed to all parties, the fact is that lawyers remain, in my opinion, the major stumbling block to an implementation of this system. The reason for that is very simple: most people, when they have a problem, will go to their lawyer for advice. That is the first thing they do, and they have always done it.

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If the lawyer is unfamiliar with these methods of dispute resolution, if the lawyer does not want to take the time to learn about them, because they are substantially different from that which he or she is accustomed to, chances are that the client will not be advised to get involved in this matter. A simple thing, for example, like drafting a clause requiring arbitration in a commercial agreement is all it takes, a clause, but if it is not there and if nobody bothers to focus on it, you will never get to stage one.

What is required, obviously, is a tremendous effort to educate lawyers. People like the next witness before you, Ernie Tannis, and other people across the country have been doing precisely that. The Canadian Bar Association had a national task force on dispute resolution and there is a book that is being published that deals with some 20-odd recommendations that we on the task force made to the Canadian Bar Association national executive for the implementation of the various methods of dispute resolution and increasing the educational awareness of people who are ultimately going to have to bring it to the public; namely, lawyers, legislators and others.

I think what would be of some assistance to you, given the limited time that is available, is to talk to you about what these magical techniques are and explain a little bit about how they work. You will see, in effect, when we are finished that you have used undoubtedly most of these

techniques in your day-to-day life. It just becomes a question of the degree of sophistication.

The first standard form of dispute resolution, as far as a technique is concerned, is negotiation. That has been in existence ever since the population of the world came to three: two people fighting, trying to resolve their problems, one person ultimately coming in at the end, if necessary, to finally resolve it for them. These skills are skills that lawyers in particular ought to have as a part of their arsenal on a daily basis. The fact is that these skills require a great deal of use and refinement in order to be effective.

Let me give you an example of that. Your typical litigation lawyer has a client come into the office. The client has already been involved, let's say, with the corporate aspect or the real estate aspect of the problem. They have tried in some way to resolve their dispute and it has not worked. The first thing most litigation lawyers do is tend to identify with their client. In other words, they stand in their client's shoes. They take the rigid, perhaps unprincipled, approach that the client has taken, not looking at the other side with a clear view. The other side does exactly the same thing. The next thing that happens is a barrage of letters. The barrage of letters just increases the hostility, resulting in a statement of claim.

A statement of claim, making all kinds of scurrilous and scandalous allegations, and hopefully in most cases containing something that relates to the issue, results in a statement of defence which is of the same calibre. The next thing you know, you have a substantial hiatus while all the parties produce their documents. This can take two or three months or more. Then they get around to rearranging their calendars and looking at dates for examinations for discovery. These examinations can take place as much as a year after the problem has been crystallized by a statement of claim. The next thing that happens is that examinations for discovery usually result in further examinations, further production of documents, further delay, further cost.

This is the method that we use for gathering the truth, finding out what really occurred. It is a time-tested method. In some cases it is absolutely essential; but in other cases, if the parties had the will or if legislation existed to force them to do it otherwise, they could get all this done in the first three months.

Let me give you a concrete example. Under the Canada Labour Code there is a provision for adjudication in wrongful dismissal disputes. This

governs federally governed industries: banking, air transport, communications, etc. In those cases any employee is entitled to complain that he or she has been unjustly dismissed. The minister is entitled to appoint a fact-finder who then comes back with a recommendation saying, "Yes, I think there should be a hearing." The fact-finder also tries to be a conciliator to resolve the dispute between the parties. If that fails, the minister appoints an adjudicator who writes the parties a letter saying: "We're going to have the trial of this issue on this date. Be there." You can apply for orders from this person to get production of documents and then you get on with the trial. There are no examinations for discovery; it would be the exception rather than the rule.

What is the result of this? The typical wrongful dismissal lawsuit in Ontario today will take three to five years, depending on its complexity and depending on the backlog in the court system. Under the Canada Labour Code I have done perhaps 20 of these adjudications; not one of them has taken longer than eight months start to finish.

When you think about the saving in time, the lack of duplication that is involved in any lawsuit where the lawyers get all geared up, learn all the facts, know their case, charge the clients and then are forced, because there is a three-year delay, to learn the whole case again, the client gets charged a second time. With the adjudication you do it once, and there are very few adjudicators who will agree to any adjournments. What they say is, "If you can't make it, get another lawyer."

Negotiation is an even better method of resolving a dispute, if the parties have the will to resolve their dispute. They go from the basis of what is known as principled bargaining. They look for common ground between the two parties. They do not adopt the rigid approach. They try to find a way to resolve the dispute that leaves each party in a win-win situation as opposed to a win-lose situation, which is your typical adjudication situation.

What is the advantage of that? Nobody gets everything. Hopefully everybody comes away with some sense that he or she has been served well by the process. That is one of the standard methods of resolving disputes. It is, of course, voluntary. It is not in a formal situation such as a court proceeding and it is done often either between representatives of the parties or, at the best level, between the parties themselves.

One of the other things that we have learned about this system of negotiation is that because

the parties have a direct input into what is said and done, they understand the process better. They feel a part of it. Usually, agreements that are the result of negotiations are more long-lasting agreements and more willingly enforced by the parties themselves than situations that are imposed upon them.

Lawyers have a long way to go in learning the skills of negotiation. There are courses that I have attended, and I know many others have, at Harvard Law School and other places. There are courses now in British Columbia. I am part of a group that is involved with the Advocates' Society Institute in ongoing training programs for members of the Advocates' Society in negotiation, largely because we feel that we were not trained in law school for this purpose and it is about time we got trained.

Let's talk about the most successful method of resolving disputes. It is called mediation. Mediation is nothing more than a third party who is a neutral party coming in at the request of the two disputants to try to guide them to a mutually satisfactory resolution of the problem. It is important that you understand that this is voluntary on the part of the parties in most cases, that this mediator does not have the power to make a decision. He or she is there based on the skills acquired to assist the parties in coming to their own resolution of disputes.

In the typical mediation you will have private meetings between the mediator in each party, general caucuses between both sides and ultimately a guided resolution, if possible. The way that works is that the mediator is able to gain the confidence of each party by undertaking not to disclose things that the party does not want disclosed, but learning what the party's bottom line is in the dispute and then, with the party's consent, conveying a certain amount of that information to the other side, doing the same thing on the other side and ultimately coming up again with a shopping list of what each party really wants and finding which ones are common to both and resulting, hopefully, in a resolution of the dispute.

Why is this useful? For example, corporations that have ongoing relationships cannot afford to fracture that tenuous series of interpersonal relations by a long, bitter lawsuit. Lawsuits, if they do anything, really scar the parties. I have been doing this for about 16 years, so I am fairly new at it compared to some of the people you hear from. But I can tell you that I have seen the scars of litigation.

Sometimes it is absolutely essential to litigate because there are public policy issues, there are issues of credibility or there are constitutional issues. You cannot avoid them. But in many cases you find that parties are absolutely terrified of the court system. They do not understand it, they do not want to be there, they do not feel they have an input, and it leaves them, generally speaking, unsatisfied. Even if they win, they are often the losers in terms of cost and they are the losers in terms of their relationship.

Take your typical neighbourhood dispute, landlord and tenant, a neighbour's kid throwing a rock through the window or whatever it happens to be. The worst case I ever litigated involved two neighbours at a cottage. One was landlocked because the other had the road access to the property. For 25 years, they lived side by side. They spent thousands of dollars. My client was the victor. He ended up giving away this thing he won, just to show the other side who was in charge. He litigated this entire thing to show someone who was in charge. It destroyed the relationship for ever. That dispute could have been mediated inside a week, but nobody knew how to do it.

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Government, public interest groups, environmental disputes—perfect for mediation; large, multiparty issues, getting the parties together, getting the clear delineation of the issues and resolving them with the assistance of experts. This is a method that, in my view, is probably the most valuable tool we have, one that is used regularly, as you probably know, in labour disputes and family law disputes. There is no reason why it cannot be used in commercial, corporate, all kinds of traditional matters of business to resolve disputes.

In the United States, I can tell you that the American Arbitration Association, which provides a complete range of arbitration and mediation services, has in the past year resolved some of the largest commercial disputes in the history of the United States by these methods, saving literally 10 to 15 years of court time and hundreds of millions of dollars in legal fees, never mind the human cost of doing it.

The kinds of skills that are necessary to be a mediator are very important, because you have to understand the client's needs, you have to inspire confidence, and most important, you have to have the skill to seek joint gains, to find out where the parties can come together. You are also a scapegoat and a sounding board, because what the parties might not be prepared to say to

each other, they will unleash on you, feeling that in some way you are going to communicate that to the other side and they feel better as a result of it.

The studies also show that people who engage in mediations which result in a dispute are more bound and feel more bound by their agreements, but much more important, have reported they understood what happened, and interestingly enough, the most important thing was that they had a chance to tell their story.

I came out of court yesterday on a criminal matter where the crown attorney was trying to introduce evidence. We had a number of technical defences. She had three witnesses sitting there who had come from across the province. The case was dismissed in an hour. None of the witnesses were spoken to afterwards, none of them understood why they were leaving, why they did not get a chance to testify. That is a typical example—it happens every day—of the system not incorporating the needs of the parties to the dispute.

What is particularly interesting about mediation is that studies in the United States show that in jurisdictions where the legislation requires parties to mediate their disputes before proceeding to litigation, those who are forced to mediate report more satisfaction than those who went into it on a voluntary basis. I think that just highlights the point that I am trying to make. We need an impetus, whether it is legislative or otherwise, to get parties into this system.

The kind of system that is used in the United States, for example, in the federal jurisdiction, in a number of federal courts they have what they call a mandatory court annexed to mediation or arbitration as part of the judicial process. It has been used to force parties to mediate or arbitrate disputes up to \$125,000 in value.

The way it works is this: You are required to mediate or arbitrate in the first instance and the court appoints the arbitrator or mediator. If you do not like the result of the mediation or arbitration, you can then go on with your litigation, but in these jurisdictions, if you do not achieve at least 10 per cent more than what you were awarded in the first instance, you pay all the costs.

So these systems are already in place in the United States, and these are the kinds of things that I think probably the committee would be interested in knowing about. There are all kinds of materials. You have been provided with some papers, I think, and I am sure you will hear more about it, but these are methods of incorporating

mediation and arbitration right into the judicial process as an adjunct to what we call the usual litigation process.

Arbitration we have talked a little bit about, and I think what I should do for a few minutes is just tell you what the advantages are perceived to be and what some of the disadvantages are of arbitration.

You are all familiar, of course, with labour arbitration because you see it. It is provided for by statute and it is used in that field on a regular basis. What you do not see and hear about very much is arbitration in commercial disputes, arbitration per se in family disputes, as opposed to mediation, for example, arbitration in native land claims, arbitration in environmental issues. The question is, why?

What are the advantages? First of all, if the parties have good faith, arbitration can be much faster than litigation. For example, there is no discovery process. I have been in discoveries that have lasted six months. There are no discoveries. There is complete disclosure of documents if the arbitrator so orders, and there is no reason why an arbitrator cannot.

In the commercial arbitration tribunal in London, England, which is the one that settles most trade disputes, what happens is that the parties to the dispute are required to produce to the other side a complete brief saying, "Here is my list of witnesses, here is what the witnesses will say and here are all the documents that we are going to rely upon," in one fell swoop. When they get to trial, they introduce the witness and in many cases all they do is say, "Is this your declaration?" "Yes." "Are these your documents?" "Yes." Then they sit down. That is their case; the evidence is in. Then the other side can cross-examine. That has saved 50 per cent of the trial time right there.

In arbitration, if it is done the right way, you can have the arbitrator empowered to make orders that the other side produce documents and fix the date for the hearing. There is flexibility in terms of where the hearing will be held. It can be held in a hotel room, it can be held in somebody's law office, it can be held anywhere.

There is flexibility as to the admissibility of evidence. Again, the parties can make agreements about what will be admissible. So many times you hear participants in the judicial process talking about these bizarre rules that courts have about what evidence is admissible and what is not. They do not understand any of that, they just want to tell their story. Arbitrators, if they are trained properly, can ignore the extraneous,

irrelevant evidence, although the party is allowed to say it. It comes in, they have the feeling, "I have told my story," and then a skilled arbitrator, a trained arbitrator, can just eliminate the part that would otherwise be inadmissible with respect to those proceedings.

You have the expertise of the decision-maker. If you go to a courtroom today on a complex commercial dispute, you may get a judge who has never done a corporate commercial deal over \$200,000 in his or her life, in the same way that I would know nothing about patent disputes, I would know nothing about family law matters. So it is a bit of a shotgun. This is no attempt at all to disparage our judiciary. There is too much law. There are too many areas to practice in. The world is saying, "Become a specialist." You cannot expect these people to know everything.

With an arbitrator, you can choose one or three arbitrators—I suppose two if you really wanted to, but the usual is one or three—to resolve your disputes. Out there there are experts whom the parties will choose from. If they cannot agree, there are provisions in these agreements, for example, to apply to a court and the court can make an order as to who the arbitrator will be, but you get an expert.

If you have a personal injury dispute, it is a question of physical harm, economic loss. What is the value of this person's injury? There must be 1,000 downtown who have had experience. There are probably 200 or 300 who know as much or more than any judge practising about that area. The room can be rented, the parties can be there, the evidence can be adduced and it can be over in virtually no time.

If there is no good faith, if one party is trying to stall, arbitrations can go much longer. That is why we have proposed amendments to the Arbitrations Act based on the Alberta model to avoid a number of these problems, to avoid parties going to court and saying, "Yes, we agreed to arbitrate, but this isn't an issue that the arbitrator can decide, it has to go to a court." That is a classic stall tactic when one side thinks it is going to lose the dispute and tries to get it out of arbitration. That is why we need, in my view, legislative assistance to ensure that this does not happen.

The finality of the decision: Save and except for jurisdictional questions, there is no appeal from an arbitrator. That is one thing that has raised the ire of a number of members of my profession. They say, "I'd love to arbitrate a commercial dispute, but I want a right to appeal." At this stage in the game they are not satisfied,

because they have not been involved in it, with the expertise of the arbitrator. They want that right. But even if they had that right, it would still be half the time that it takes to litigate a matter.

Privacy: Any number of times, whether it happens to be a family dispute, a commercial dispute or any number of things, there is no reason why the courts in our province have to be clogged with these kinds of disputes. They can be resolved in private. Corporations have sensitivity about certain issues becoming public. Questions of trade secrets, formulae, that kind of thing, may have to be arbitrated. There is no need to have that in the public. That is the advantage of arbitration: It can be done quickly and it can be done privately.

As I have indicated, if the parties are of goodwill, the cost can be low. The speed applies in the same way. If the parties feel that they are actually in a position to co-operate, you can have it done in half the time.

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But the most important thing to remember is that you can have two types of arbitration. You can have court-annexed, wherein the legislation provides that it is part of the court system, and you can have private and voluntary arbitration pursuant to a grievance. These are methods that are used extensively in the United States and are only now becoming more useful to us here.

You may or may not be aware that Canada is part of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This becomes important in the context of free trade. We are sitting now with a situation where Ontario could become a major international commercial arbitration centre in the same way that Vancouver has attempted to become one. We could really develop an expertise in this area. Think of all the disputes that are going to arise collaterally out of free trade issues, and here we are.

We are also part of the United Nations Commission on International Trade Law Model Law for International Commercial Arbitration. For example, British Columbia has, as I have said, and so does Quebec, an international commercial centre. They provide the whole system. They have a whole series of rules. They have a panel of arbitrators available. They have a centre where you can have your disputes resolved.

I think what the government of Ontario and the federal government have to consider, with respect, is the ultimate cost and the benefit of agreeing to provide part of the funding that is

necessary to create these types of venues, to underwrite part of the cost of this type of dispute resolution opposite the cost of more courtrooms, more judges, more commissioners, etc.

I think you are going to find that if the idea were properly presented, properly marketed, you would also get a great deal of co-operation from corporations and from the insurance industries, who are very keen to have a number of their disputes resolved in this way as opposed to proceeding through court.

This is already being done, as I am sure you are going to hear over the next few days from various witnesses. A professor at the University of Western Ontario has already taken over a program to resolve property disputes of a certain economic level arising out of motor vehicle claims and so on. There is no reason why all kinds of different disputes of this type could not be resolved in this way, and equally, there is no reason why major arbitrations involving substantial dollars in commercial disputes could not be resolved this way.

So there are your three major methods of dispute resolution: negotiation, mediation and arbitration. There are others. You will hear, I see, from looking at the list, a little bit about what is called private adjudication, or rent-a-judge. Now we do not have judges for hire here, but in the United States, this is a growing phenomenon.

What happens, particularly in the southern United States, and California is the best example, is that a number of judges who have retired from the bench offer their services as private adjudicators. The major concern now is that more of them are leaving because they are making more money and they are under less stress than they were in the system. They are providing the expertise that is necessary and they are resolving major commercial disputes.

That raises a concern about: Are we losing the best judges? Is there a law for the rich and a law for the poor in terms of quality of justice? The other side of that coin is: Why clog up the courts with huge commercial disputes that someone like this can resolve in a hotel room?

You will hear from my colleague on the Canadian Bar Association—Ontario ADR committee, Bob Blair. Bob is part of something called the private court. It is a collection of lawyers who offer their services as private adjudicators. There is no suggestion that this type of adjudication is less expensive than the other method, because you have to pay a substantial fee for the quality of person you are getting to adjudicate the result, you have to pay for the

expenses, you have your lawyers, but you do not have a four- and five-year delay, you do not have witnesses dying, you do not have witnesses moving to other countries. You have the chance to resolve it, usually within a year, in a way in which the dirty laundry that is involved, the publicity attached to it, is not made public, and I think to a substantial advantage to everyone.

All of these methods, ladies and gentlemen, are also available for your constituents. This is something that I know you will hear from a number of people who are coming, but I will tell you that there are any number of neighbourhood justice centres, which are methods of resolving disputes in the neighbourhood, whether it is landlord and tenant, whether it is family disputes, whether it is diversion of juveniles from the criminal justice system, whether it is native claims. All these matters can be resolved by the use of these methods, and this is something that allows your constituents the opportunity to have access to justice, which they otherwise could not afford in the system they are in now.

We are in a position now where the average income is—whatever it is, and I can assure you that whatever it is, most people cannot afford to retain a lawyer. I would not retain one. I cannot imagine who would, other than a corporation.

These people have issues that they want to have resolved. They may not be able to afford a full-blown trial, but what about the use of these methods of dispute resolution to ensure that they get the equivalent of their day in court? It is very important, as far as I am concerned.

Finally, I will just tell you a little bit about a couple of other methods. These are called the hybrid methods of dispute resolution. One of them is called med-arb; it is a combination of mediation and arbitration. The parties can agree that a neutral third party comes in and tries to help the two parties resolve their dispute. If the two parties cannot finally agree—they have already agreed in the first instance—this very same person will then arbitrate the dispute for them and give them a final, binding decision. It requires a great deal of faith in the arbitrator, obviously, because you have given him some confidential information. It is cost-efficient and works very well in a number of cases.

Some of you who follow baseball may have read about Bo Jackson's little arbitration that occurred a while ago. That is what is known as the shotgun arbitration. It is called final offer selection.

What is involved is, one guy says, "I'm worth \$2.5 million," and the other guy says, "You're

worth \$1 million." If those are the final numbers, in they go to the arbitrator. The arbitrator says this or that; nothing in between.

Bo lost. Sometimes they win. That is why they settled with Henke. Henke's offer was the one that was going to be accepted. That was the concern on the other side: Who was the most reasonable? In Bo's case, he was so far apart from where the other side was that the arbitrator had to look at the size and all the other aspects and came out in favour of the other side. That is a method that is used in that type of dispute resolution.

As far as training is concerned, just briefly what we are doing about this is that you will hear from a number of people that the Canadian Bar Association, on a national and provincial level, is involved in running programs. These are some of the examples of the programs that are run on a regular basis throughout Ontario and throughout the country to try to educate the members of our profession as to these methods of dispute resolution.

We have the creation of speakers' bureaus to go out to speak to the public in all different areas to try to bring them on side. We are going to be arranging what we call a travelling roadshow to speak to chambers of commerce, to speak to better business bureaus, to go and speak to law associations, high schools, all different levels. In our view, it is most important that you start with the youth in the community, get them used to the idea of principled resolution of their disputes and bring it up through the university system into the law schools, into the other professions, the social work professions, the medical professions and so on, so that ultimately you have a body of people who are thinking about dispute resolution as opposed to conflict, because the cost of conflict is too high emotionally and otherwise.

I suppose by way of conclusion, what I think I would like to leave with you is the fact that you, as members of the provincial Legislature, have a very unique opportunity. You are dealing now with an issue that is in its infancy in this province, and in fact in this country. Notwithstanding hundreds of organizations you will hear about, it is in its infancy. You have a chance to use your skills and your power, in co-operation with the federal government, to literally change the course of dispute resolution, to achieve substantial savings for your constituents, and yet to ensure that they get the equivalent of their day in court.

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Really, it is our view that without your assistance, this will not occur on a voluntary basis. Lawyers will not take that step themselves. We think that it is going to require a little judicial nudge, a little legislative nudge to get them involved. The courts have done it in terms of the court reform process. We now have early intervention in the form of case management. That is in its infancy, as you probably know. But the whole question of whether there should be legislation to provide for mediation and arbitration as part of our system, whether there should be a government commitment to provide funding for centres to resolve disputes outside the court system to take away some of that backlog, to provide for a less expensive access to justice for the constituents, are matters that you will have to decide. If we can be of any assistance in that regard, the Canadian Bar Association would be happy to do so.

Those are my comments and I would be happy to answer any questions you may have.

The Chair: Thank you very much for a very clear and concise statement on the issue, particularly for touching on some public policy questions with respect to alternative dispute resolutions, which really is the reason why this committee is meeting.

We do have a number of members who have questions for you. I have a couple myself afterwards.

Mr McGuinty: I thank you for a brilliant presentation and a very logical follow-up on one of the finest statements I have ever heard from your colleague Mr McMurtry yesterday. Perhaps the highest praise I could give Mr McMurtry's statement is I will impose it upon my lawyer sons as required reading. If they do not understand it, I will foreclose their mortgages.

Your presentation was devoid of legal jargon. I was going to say it is a commonsense appeal, but really it is the common sense of other days. It is uncommon sense today and I found it very convincing and very compelling. You really struck a responsive chord in me. I used to live in Ottawa. I get back there two days a week, and really I am a social worker in my constituency office for about four days.

You referred to the situations with which we deal: people, sometimes poor, frightened, intimidated by the law. As Mr McMurtry said yesterday so brilliantly, the mark of a civilized society surely is to be found in the access that people have to due process. I find many cases, situations where you are approached.

A couple of questions: Just as a matter of curiosity, in the Bo Jackson case, what is the logic of not having a sawoff in between the extremes?

Mr Kelly: I think the theory is that they could certainly, if they chose to do so, by way of agreement, have an agreement to try to mediate and come to a common number. I think probably it is typical of the adversarial nature of the parties involved in the dispute that they say, "You just take your best shot, we'll take our best shot and we'll see who's right."

I guess the advantage to it is this: it forces the parties to focus very clearly, very quickly, on what they could lose, in this case \$1.5 million. If he had come in—say the parties were at \$1.7 million and \$2.1 million. Then the decision-maker is in a very difficult position. He can hear the evidence as to what is necessary and so on, but it is very close. It focuses parties not to be unreasonable, and that is half the battle.

That is what I mean about principled negotiations. If I say to you, "This is our position and we're not moving from it," of course your immediate reaction is to say, "Fine, if that's the way you are, this is how I'll be," rather than saying: "Well, help me out. I don't understand and I'd like to understand. How did you come to that? Let's use objective criteria, and if you can convince me objectively, then that's the reason it should be that way."

In this case I think they are saying: "You've got highly paid professionals representing you, you know the market, you know what everybody else got. Let's not waste time. Focus, cut out all the nonsense and focus, because look what you're going to lose if you're wrong."

Mr McGuinty: Second, a question I raised yesterday was not really adequately answered, but I think you did in part today. You alluded to the fact that, for example, with a medical injury there are all kinds of experts. I do not use the word "expert" as X, the unknown factor, and spurt, as drip under pressure, but people very knowledgeable in specific areas. For example, I think somebody can set himself up as a marriage counsellor, put out a shingle and advertise. Would there be any controls or regulations required to define perhaps the qualifications of an arbitrator or a mediator, or would this simply be left to the expertise or the judgement of those who are going to avail themselves of the service and they could select? Could we visualize somebody setting himself up as a mediator? For example, there is a medical doctor who is—what do you call it when he is not disbarred but

forbidden from practising—but they could not forbid him from setting himself up as a counsellor, which is deemed to be a different field of activity. Do you visualize the need for any controls in that area?

Mr Kelly: Yes. We are working closely with the Arbitrators' Institute of Canada, and Mr Wilkinson or one of his representatives may or may not be represented in this group; I would think probably so. It is a concern that they have raised because the point they make is, "Well, here's the Canadian Bar Association concerning itself with standards for its profession, should there be certification of lawyers, a minimum certification, before they can hold themselves out as arbitrators and mediators?"

One of the things we concluded in the national task force report is that we have to have a great deal of communication between levels of government and other organizations who do in fact at this time offer these services. Because the fact that you are a lawyer, the fact that you are a social worker, the fact that you are an engineer does not mean you are going to be a good arbitrator or a good mediator. Mediation and arbitration are as much a science as a skill.

What we want to do is come to a common consensus with other interest groups to ensure that, as you say, a charlatan does not hang out his or her shingle, that there is a minimum level of understanding of rules and procedures and so on, which will not make it the exclusive domain of lawyers. I think you probably know better than most that lawyers, more often than not, are not involved in arbitration and mediation. There are some family law people who do but there is no skill that a lawyer has acquired as a result of training in law school to do these things. There are many better arbitrators and mediators elsewhere.

Mr McGuinty: I suspect that from lawyers in my own party.

Mr Kelly: I think that is true.

We need a minimum series of standards that are achieved as a result of that kind of co-operation we are talking about to protect the public, but certainly not to make it an exclusive domain at all.

Mr Villeneuve: Thank you for a very enlightening presentation that is completely honest.

What you are speaking of, I think, presently exists in the process where a land acquisition is done through expropriation. I think you are kind of going through that process. I happen to have on occasion, in my other incarnation as a real estate appraiser, sat at the kitchen table and

worked out what seemed to be very broad gaps in what was offered and what was anticipated. And yes, some of them wound up in the courts, but by and large they were settled through the very process of which you speak. I think to formalize it into other areas makes a great deal of sense. A percentage will wind up in the courts of law. However, could you maybe explain what might be a little bit different in the expropriation process as opposed to what you spoke of this morning?

Mr Kelly: The expropriation process, of course, is as a result of a statute that gives municipalities or provinces, in certain cases, the power to expropriate property, and as a result of that there is a statutorily created board that will sit and decide the value of compensation, if any, to be given to the person whose property is expropriated.

Evidence is led. It is a quasi-judicial proceeding to the extent that evidence is led and you have to comply with the rules of procedure at that board and you have to bring in your experts, as you know, to give evidence as to the value and loss of income and so on. Then a decision is made by a panel of experts in that area.

That is a fairly structured board in the same way as the Ontario Municipal Board and the unemployment insurance commission. They are all created pursuant to a statute to decide certain things. So we call those quasi-judicial bodies.

What we are talking about here is that you and I can write out an agreement together. I am going to sell you my company or my house or my secondhand car for X dollars. We are going to say in this agreement, because we have an ongoing relationship, "If there is a dispute as a result of this agreement, instead of going to the courts we're going to an arbitrator," or "We agree to mediate for a period of time." This can be put right in the agreement, and if it is in the agreement, then we usually make provision for how we choose the arbitrator, who pays and so on. That is the private method of doing it, so that you can just simply, by virtue of a written agreement say, "We will arbitrate or mediate."

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If you do not have it in the agreement, you can still—if you and I have a dispute, I can say to you: "Look, we can go to court and be there for five years. What about let's get someone to mediate our dispute or at least try it?" We go out to a list of mediators and we agree we have to pay this person. We tell him or her the facts privately, as I have said, and then together and the mediator tries to mediate the matter, to bring us to our own

conclusion. You and I craft the agreement; the mediator does not do it. In arbitration, the arbitrator is given the power by us to make the agreement. That is the most like the court system, but those are private agreements.

The other way to do it, as I was saying earlier, is by statute where simply the Legislature with the appropriate jurisdiction enacts, for example, in the rules of practice or in the Courts of Justice Act, a provision that says, "In Ontario disputes of this size will be in the first instance resolved by mediation or arbitration." That is the choice the legislatures have to make. Shall we force this on the parties to save money and so on? Shall we make it an alternative they can voluntarily choose? Those are the considerations you have, as I see it. But the difference is one between a statutory body that forces persons to come before it and decide it in a quasi-judicial manner and something that is done by agreement between the parties, such as arbitration or mediation.

Mr Villeneuve: So the people involved are really structuring the type of negotiations that will occur as they go forth.

Mr Kelly: Exactly.

Mr Villeneuve: It is interesting they will then have the choice of the arbitrator, judge, whomever, whatever. I know certain solicitors structure their defence for a certain judge if he or she happens to be on the bench that day and takes a different view of the—

Mr Kelly: That is right.

Mr Villeneuve: This would be the interesting part, that both parties would go and choose the arbitrator.

Mr Kelly: If you had two constituents come to you with a really serious problem, or what they thought was a really serious problem—just to use a simple one, the common driveway where one guy's Jeep or Jimmy, or whatever it is that has those big fat tires, keeps running over the lawn of the other guy. People laugh, but one of the first cases I ever prosecuted when I was a crown attorney was an attempted murder case, where the neighbour shot him right through the stomach the 15th time that the truck went over on his side of the grass. So these things, as you probably know, can escalate into pretty serious disputes.

This is a classic for mediation, a classic. Parties could end up hating each other for the rest of their lives living next door. Maybe they do not have the ability to move, maybe they are forced to move because they cannot come to a simple resolution of their dispute. In a neighbourhood

justice centre, which I am sure Mr Tannis will tell you about, they will have the opportunity to walk right in and have a skilled mediator sit them down. They unload all the abuse they want and the mediator helps them to fashion the resolution of that dispute. Do we make the concrete blocks a little broader or do we make the tires a little smaller, etc? That is why those agreements are more lasting, because people made their own resolution.

Mr Villeneuve: That is most interesting coming from a man belonging to the bar, to hear that—

Mr Kelly: Yes, I do not drive downtown safely any more, I can assure you.

Mr D. W. Smith: I certainly have enjoyed your presentation too. In fact, listening to you, I would not even say that you sounded like a lawyer I have run into or done business with or anything like this—

Mr Villeneuve: There is one on either side of you.

Mr D. W. Smith: Sorry, fellows.

Since you made the comment that we would have trouble convincing the lawyers, and you are talking to somewhat of a political group here, I sense that we have made an awful lot of lawyers perturbed, mad, ugly on the auto insurance bill. Do you think we would alienate all the rest if we tried to implement legislation along these lines that we are discussing here?

Mr Kelly: Now I am speaking for myself in answering this question, and my opinion is no. What I think lawyers have not yet come to realize is what seems to me to be a very simple way of looking at the problem. It is true that if, for example, parties were required to arbitrate or mediate their disputes on a compulsory basis, you would not have the long, drawn-out process, you would not have discoveries that last for ever, pleadings, trial and so on. But the lawyers are still involved because they are the ones who represent their clients, particularly and for example, the ones I am talking about, commercial arbitrations, corporate problems and so on. They are going to be representing their clients either as counsel or as the arbitrator or perhaps, if they are skilled to do so, as the mediator. So they are involved in any event.

My preference has always been to get away from long cases with a million documents into something I can see start and finish in a reasonable period of time. That is certainly my clients' preference. If I say to my client, "Well, we can go two ways. We can go six years, fight it

out to the courtroom steps and settle, and it will cost you \$200,000 in legal fees"—or \$1 million in legal fees or \$5,000, whatever the dispute is—"or we can go to this person and possibly mediate or arbitrate the dispute. It will take an eighth of the time and, if we're successful, you'll have a better resolution and it will cost you a sixteenth the amount of money," it strikes me that client would say, "Now there's a good lawyer. I should tell my friends about that lawyer." I think you would get much more business and more people would come to have their disputes resolved.

Mr D. W. Smith: But is it going from the system we have now? When I say system, maybe the pay structure of lawyers—and I am not a lawyer so I do not know how they get paid. But I have constituents come to me and they give me their side of—well, I can think of a divorce case that went on for five and a half years. I will admit I only heard one side of the story, but would the lawyer be able to get as much money out of the case by arbitration or this way of dealing with the issue as he would by taking a percentage out of—this guy came to me and he said that he was worth \$500,000 in the divorce proceedings and that in the end, you know, family law reform says that it is supposed to be split evenly. He said: "I owe money now. I have nothing." He is not even sure if his ex-wife has even half the money, because the lawyer took it all. I am just wondering how they adjust to go from one system to the other system. Is that the thing that scares the lawyers off?

Mr Kelly: I think that is part of it. I think it is only part of it. I think that most of my colleagues in the civil, corporate and commercial litigation area who have been involved in long-drawn-out cases do not like doing that. They do not like it because there is a great deal of work involved in that. You are always worried about your file. You worry about it for five years. You wake up in the middle of the night worrying about a file that is not yet resolved. So if they had a way in which they could be actively involved, perform a professional service—and it is not as if they are going to reduce their hourly rate; they cannot afford to in this city, or any other city for that matter—they are going to be doing it. They are going to just be doing it faster, less expensively for the client and probably resulting in, unfortunately, more business, even if it is family law.

My own particular personal view is that family law disputes ought not to be in the courts at all. I see no basis for having family law, and I do some of that work. I see no basis for that. If ever there was a case for mediation, arbitration or some-

thing other than a court system, I just cannot imagine why family law is in the courts. I have just alienated a third of my colleagues who disagree, but I can tell you this—

Mr Jackson: And a member over here. That's fine. I'll get to you in a minute.

Mr Kelly: Yes. From my own view, when you get to dealing with issues of custody and access, things of that nature, in ongoing relationships where the parents are going to have to deal with each other for the rest of their lives, as long as these children are children and thereafter in many cases, to force them in front of a Supreme Court judge to battle on those issues is something that escapes my capacity to understand.

Mr D. W. Smith: I will admit there are some pretty ugly scenes out there from people who come to me, but I think it sounds like a lot of training and a lot of communication to try to sell this approach.

Mr Kelly: It does, but once it is done and it is under way in law schools across the country—and British Columbia in particular has taken a lead in this area, much more so than any other province I am aware of—it does not take long to understand the benefits. The reason they are so reluctant is that we were not trained this way in law school, we just were not trained that way. Now they are coming out of law school being trained that way.

The Chair: Just as a matter of process, it appears as though we have a few more questioners and we will probably go beyond the time. I would just like to ask Mr Kelly and Mr Tannis for their collective approval, I guess, if we can go beyond the time limit for Mr Kelly and then perhaps for Mr Tannis later on.

Mr Kelly: I am content, Mr Chairman, to stay a few minutes longer.

Mr Furlong: First, I think I should alleviate my colleague's deep, deep regret that lawyers are going to suffer. David, for every piece of legislation we pass in this place, we create work for lawyers.

Mr D. W. Smith: I am glad you said it.

Mr Kelly: And we are grateful.

Mr Furlong: I have just two brief questions. First of all, I am interested in your views on the training of arbitrators and mediators. It has been my experience, particularly in the labour area, that a lot of mediators and arbitrators really—let me put it that there is a great disparity between the work of some and the work of others. I sat through a mediation process on a school board some years ago and found the mediation process

rather unusual, and I have been around a number of others lately. So it depends on the mediator and the arbitrator.

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I am just wondering what is being done to train these people properly. Even though someone is an expert in a field, that, as you said, does not necessarily make him an arbitrator. What is being done? What is being promoted by the law society? What is being promoted by the Advocates' Society to deal with these things, to make sure that we have proper arbitrators?

Mr Kelly: Speaking on behalf of the bar association, we are in the stages of infancy in that regard. I mentioned before the Advocates' Society Institute, of which I am a member. We now have in place specialist training programs to train people to teach negotiation as a skill, for example. With the agreement of the various law schools, we want to create programs, which we hope will be compulsory, to provide skills training in mediation and arbitration at the law school level and courses at the bar admission level. Mr Tannis will be able to tell you a bit more about that. Then we hope that, if it is appropriate, for people who really want to specialize in this area, through our standing committee, which we ultimately hope to have, we will have an actual specialists' training program for lawyers practising.

That is not to say, and I repeat, that these lawyers will come out and ultimately, in spite of their skills, be better arbitrators or mediators than people who have no formal training at all. As I am sure you are aware, both in the United States and elsewhere, some of the very best arbitrators and mediators are not professionals. They are simply people who have common sense, who can get to an issue, which seems to be difficult for a number in our profession, including me.

We do feel that there is a need, as you have said, to not only have the basic level of identifiable knowledge skills, but thereafter, it has been my experience—I have taken two years to go to Harvard for these courses. They are available to anyone who can take the time and so on, and I must tell you, the difference in level is quite frightening. In a negotiation, these people will have your clothes off in no time, and you are smiling while they are doing it, and they have got the wallet and they are on their way out the door. These people have been doing it for a while. We need that kind of training.

We also need training of mediators who are really sensitive to the issues of the people coming before them, because, as we have heard, the

average citizen has nothing to do with this kind of experience, as you well know. A mediator or arbitrator who handles those parties the wrong way creates yet another adverse reaction to the system, a lack of understanding and an unwillingness to do it again.

So, yes, we have a great deal of work to do. We are beginning to design the courses and to get the co-operation of a lot of schools. It certainly will not happen overnight.

We are also working, I might add, with the Arbitrators' Institute of Canada, which has been most helpful in coming forward and proposing a joint program of certification in arbitration for lawyers in the first instance and then, I am sure, arbitrators in other professions in the end, if they are interested in following through.

Mr Furlong: Would you see a situation in commercial arbitration disputes, for example, where you would have—you mentioned one or two experts. In the labour field you get the three-man board where you have labour appointing one and management appointing one and then they get together and select a chairman. Would that type of concept work in commercial disputes or other forms of dispute?

Mr Kelly: Oh, yes. In your typical arbitration, as you know, you can either agree to select one person or three, as we have described. Obviously there are going to be people who are appointed, if you each have a choice of one, who will represent your particular interest, or you think they will.

The advantage of the various systems that are available—and maybe I can just spend a minute on this—a good example would be the fact that parties can agree to appoint what is known as a neutral expert, just in the same way that a judge now, if he deems it necessary under the rules, can appoint an expert on behalf of the court. The systems in the United States provide, by agreement, for precisely that. An expert could be appointed who is truly neutral, and if necessary, he could appoint other experts—appointed by him, not by the parties; by him—to resolve that technical expertise issue.

One area in which this is often done is something that is called a mini-trial, which you will hear a little bit about. In corporate commercial disputes in particular, what happens is that two companies will agree to appoint representatives to a panel, who will be senior executives who have never been involved in this dispute before. So these are senior decision-makers with the power to resolve the dispute. If they wish, they can appoint a neutral adviser. In one case in the United States, which was a \$178-million

dispute resolved in a weekend, Bowie Kuhn was the person appointed as the neutral.

This neutral can be an expert in a particular area or a person of substantial reputation who then convenes the panel. They listen to the lawyers for each side give presentations, which are basically summaries of where the case has gone to date. For example, it is often done just prior to trial. It can be done at earlier stages. They gather the evidence, they agree on what can be proven, so they do not call a bunch of witnesses, and they make their presentation. One side goes, the other side tries to dispute or refute what was said, the other side goes, and the same thing.

You are making this presentation to two senior executives who have not been involved in this dispute. Their underlings have. Their underlings may have a particular bent. Maybe they are emotionally involved in the case. Maybe they are just so far into it they have lost sight of the forest for the trees. The senior executives, having heard both sides, go away and try to resolve the problem. They can call upon that neutral expert, if they deem it necessary, to assist them or to give his or her opinion of what they think might happen if the matter goes to court. It is amazing, but a very large number of these disputes, involving anywhere from hundreds of thousands to millions of dollars, are resolved almost instantaneously as a result of this process.

It is a long answer to a short question, but I think it merits consideration.

The Chair: Thank you very much, Mr Kelly. I have a couple of questions, and then Mr Jackson. I believe the committee researcher may have a couple of follow-up questions after that, just to put in context how we might be wrapping up here.

I have noted from the recommendations of the Canadian Bar Association report on alternative dispute resolution that there are some public policy recommendations or recommendations to governments. I think there are six of them, recommendations 20 to 25. It would appear as though in fact the whole area of ADR in Canada really is in its infancy as far as public policy is concerned. That is one of the reasons this committee is meeting and dealing with this particular issue.

My question basically is, if you were the Attorney General of Ontario, how would you come to grips with this issue in terms of government policy? What should the Ministry of the Attorney General be doing, over and above the six recommendations that are in your Canadian Bar Association report?

Mr Kelly: I see that Shin Imai was speaking here yesterday. I met him a little while ago.

I think it is fair to say that the Attorney General, certainly on our committees, has consented to representatives being involved in the process with the Canadian bar, with the Advocates' Society. As you may know, the Attorney General is one of the finer counsels who has practised in the province. In spite of my personal views on some of the decisions he has come to recently, he is one of the best in the business. He has said to me on a number of occasions that he has a great interest in promoting dispute resolution—this from someone who excelled in and was trained as a specialist in litigation.

I think what is going to be necessary to determine policy is, for example, what you are doing here today, hearing from different groups, particularly, I would think, from the neighbourhood representatives, from the people. One of the things the Attorney General has said to me in the past is, "This form of dispute resolution could provide for greater access to justice." Of course, he convened the national conference on access to justice, which I was pleased to be a part of, and we heard from people across the country in this regard.

What I think is needed is a broad-ranging input of policy perspective from all forms of society, from the neighbourhood disputants to the family law disputants to the labour people, all the way up, to create a consensus as to what the problem is and how it can be resolved. This is being done to a large degree in the United States. It is being done in part as a result of the work that has been done here.

Once that policy information is available, once you have heard what the people want, what the interest groups want, then you can determine what can be done in terms of costs, because finally, I suppose, that is what you really have to deal with. Policy is fine, but if you cannot afford it, you cannot do it.

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What has to be determined is, as I said earlier, is it more cost-efficient to create a centre, use one of the existing government buildings, as an example, and provide a venue for dispute resolution, provide some office staff, a library, some training films, the rooms, the stenographers, whatever it takes to get the dispute resolution techniques under way? Is that more cost-efficient? Does it provide more access to justice for individuals? If it does, then I think it is within your power to implement, subject to

certain jurisdictional questions at the federal level. But until you have that broad input, you are going to hear from a number of interest groups; that is natural.

The Chair: How significant is the dynamic out there now with the public? When I talk about the public, I am talking about whether it is spouses—

Mr Kelly: In general.

The Chair: —whether it is commercial, corporations, etc. It appears to me as though the whole area of ADR is out there popping up like mushrooms in all kinds of different ways and governments have not come to grips with it. There is something that is happening from a societal point of view. I mentioned yesterday that we used to have trial by battle and then we went to the common-law trial by the adversarial system. Is it that significant that we are going into a whole new area as a North American society to resolve disputes and governments had better come to grips with it, because it is already happening?

Mr Kelly: There are many people who would tell you that in spite of the plethora of material and presentations of this kind, dispute resolution, even in the United States, is in its infancy. Most lawyers do not know what it is. The public has no idea what it is.

I think, however, what you are beginning to see in a ground swell is an alienation from government, from business, by the individual. We are in a highly complex society, as everybody knows. It took me two years to figure out how to turn on the computer and where the disc was, and it was a thrilling day when it all occurred. Think about the average person trying to say: "How do I get heard? I don't even know where to start." I know lawyers who do not know where to start.

The greater the alienation, the more the need, in my view, for government assistance to make people aware that, whatever their dispute is, they can get it resolved. They can have their day in court even if it is not in a courtroom.

Obviously, if the government of Ontario is interested in proactive measures, as I am sure it is, the sooner you provide the systems, the funding, the ability, the less expensive it is going to be, both in terms of our existing system and what we are paying for that and in the cost of lost opportunity for people who have not had a chance to have what they consider to be legitimate disputes resolved.

I mentioned British Columbia. If I can just finally say this, if you get a chance, you really

should read the material in here on British Columbia. They have truly been leaders, well beyond anything that has happened in the rest of the country. We are taking our lead from them.

The Chair: On a scale of one to 10, how high a priority should this area of ADR be for the Ministry of the Attorney General in Ontario?

Mr Kelly: Obviously, I suppose the Ministry of the Attorney General is now up to its ears in, first of all, dealing with the new court system, dealing with case management, and we understand that it has to go, in terms of priority, now that the legislation is in place.

But I do think that it is a prime opportunity, given that we are now focusing on court reform, for the Attorney General in due course, once the other systems are sort of planted in working order and the courts have been regionalized and so on, to consider implementing at that stage some or all of the processes we are talking about as part of the court process. If they get to the stage of finally fully implementing the new court reform system, it would seem to be counterproductive to go away from that for two or three years and come back and discuss ADR later. Now is the time, because it is all part of the system. If this system is involved in resolving disputes, ADR is one way to resolve disputes.

The Chair: Do you think it would be premature at this point for the Ministry of the Attorney General to have a unit working on this whole area to try to make some sense of it for Ontario?

Mr Kelly: I do not think so. I think that Shin and some of the others are there for that specific purpose, to give advice to the Attorney General in that regard. So in part the answer is yes, they have already begun to do it, as they have in court reform, as they have in other areas, having all their representatives available.

I certainly do think that the time is ripe and that they should consider, to the extent possible, allocating more resources, because ultimately, as I have said, it is the governments that will make this go.

Mr Jackson: It is interesting you raise the question of Shin Imai, who was here yesterday. He did not give us any direction or any priority or any of that. He identified a lot of the problems and how complex this process is, and that was helpful, but I think it would not be accurate to believe that they are getting that kind of policy direction, especially in the ministry, which has such a hands-on approach by its minister.

Anyway, my questions have to do with a couple of areas. The first is understanding the complexity of ADR and understanding the pressures in the current system to seek alternatives.

We have in our current justice system some identified weaknesses. The sensitivity of the judges is one whole area which, on the women and violence issue, has become very well documented, and clearly the federal government is reacting in response to identified weaknesses. So I guess the first question you might consider—and I will put the three together for you—is, to what extent can we hope that we would have the levels of sensitivity in trained arbitrators working in a private sector environment relationship? To what extent can society achieve that when we have identified already that our current judicial system has inherent weaknesses? There is some selectivity in the selection of both individuals.

My second area of concern is an area of concern I have for ADRs generally, having had a lot of experience in ADR and with labour disputes, and that is the issue of those vulnerable individuals and being able to identify vulnerabilities in spite of the best interests of a process which appears to have efficiency, fairness, low cost and all those other sorts of tags put on it.

I apologize for interjecting when you were speaking, but I am always quick with respect to the issues of custody, and it concerns me that in custody matters in particular, the largest single victim could be the child. As we have established in our courts when our courts evolved in custody, and you know the evolution of family law in this province, the courts now deal with a child as a third distinct entity to be protected and not part of the property. You are more familiar with all of this than I am. So now I give you my final point, and the point I really would like you to respond to at length, is this notion of—in the courts they can juggle the interests of three individuals, because the courts can say: "What we are here to do is in the best interests of the child. We will suffer justice on all three, but we are here for the best interests of the child."

I am not convinced, and maybe you can direct me to ADR mechanisms where children can have that kind of primacy, because they are clearly identified vulnerable parties. There is limited dispute on that point, whereas you have heard of the power struggle between men and women when there are no children involved, because the woman might be a victim of violence. That is two individuals being arbitrated by a neutral party. Is this injection of a third party the critical—or the

fourth or fifth or sixth, in the event that there are three children involved even.

No one has talked to us yet about that in the day and a bit that we have been on this. That is the part that I want to get right to, the point that concerns me in custody. Yes, in marital disputes I can see some value and some measured responses. We know the stuff in California where they have had to rethink it in California, and there are one or two of us on this committee who worked on the child law reform bills, which talk directly to custody and support. We have had full exposure to the California plan, with all of its blemishes and its blessings.

I will stop. My greatest concern is with respect to children as the third party and how does the alternative dispute resolution reflect that.

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Mr Kelly: Judge Steinberg in Hamilton, at the Unified Family Court, told me a while ago something that I was not aware of at all, and I think in part this addresses your concern, because of course, I guess by way of preliminary observation, given jurisdiction, legislatures can do a lot of things.

Legislatures can say, for example, the issue of child custody will be tried in a courtroom with all the trappings and the evidence of all parties and, depending on the age of the child, the child present or not. That is one way a Legislature can do it. Another way it could do it is to say there will never be a child custody hearing in that type of forum. There will, however, be certain evidence given. It could be given in camera in the absence of the child, and it could be given in any number of ways that the Legislature, subject to jurisdiction, is able to devise.

Judge Steinberg says to the parties, and he really created this, as so many judges have, "Do you want me to arbitrate this issue of custody?" If they agree, that is exactly what he does. He takes them into his chambers, he takes them wherever he takes them, he sits down and he hears their evidence, if you will. He will call upon the mediation service they have there, he will call upon any other expert he feels is necessary, and he will decide the interests of the child.

If I hear you, your concern is, if we take it outside the traditional system, who protects the child? I agree with you totally. If you had a traditional arbitration mediation, the arbitrator, to the extent that what he or she is required to do is to decide the issue, the same way a court is, it could be argued, would decide: "What is the issue? The issue is the best interests of the child."

That is what family law is replete with when it comes to custody, the best interests of the child.

To the extent that an arbitrator is required to follow jurisprudence in that regard—he is not paid by one of the parties to come to a decision that is favourable to one or the other; he is clearly directed by virtue of the agreement to deal with the best interests of the child—then an arbitrator could do that, properly skilled.

On the other hand—and this is one of the concerns I think you might have—a mediator, critics would say, is there to achieve an agreement. And the critics say it does not matter to the mediator whether it is a good agreement or a bad agreement; just get the agreement.

Mr Jackson: That is exactly right.

Mr Kelly: I think that approach to mediation would clearly be completely inappropriate in family law matters. As you know, we have two mediators now, commissioners who have been appointed by the court to assist in mediation matters in Toronto. Maybe there are three of them. Commissioner Spiegel is on my ADR committee and we have had some discussions about that.

To the extent that it is outside the court system, I have difficulty, as you have, in seeing those issues, custody, for example, outside the court system. I do not have difficulty with the idea of parties going to a skilled mediator, who, again, is directed to address himself or herself—and I think most of them do—to the best interests of the child, even if it is a private meeting, because ultimately, if the parties disagree and cannot come to a solution of their problems, they are going to go to a court to have it resolved. The court retains ultimate jurisdiction over the child.

It is really a question of, where is the dispute decided, in whose interest it is decided and at what cost is it decided? It seems to me that, given that the court will always have the overriding jurisdiction with respect to the child to set aside anything that is decided by the parties or by an arbitrator immediately, there must be mechanisms available that are less expensive, emotionally and monetarily, and less time-consuming than the typical classic custody battle that you are referring to.

Mr Jackson: Pardon me for interrupting, John, but is there not an opportunity—

The Chair: Mr Jackson, I wonder if we could kind of wrap it up fairly quickly, because we are starting to fall behind. Mr Fenson has one follow-up question and—

Mr Jackson: Then let me just state that, in fairness—

The Chair: I am not telling you not to ask the question or get a response, I am simply saying that if we can sort of compress it a little bit, it might be helpful.

Mr Jackson: Fine. I am doing my best. Thank you for your help.

The concern I have is, we have a recent bill, the Children's Law Reform Act, which I referenced just recently, and in it it sets out as the ideal, we, as legislators, have stated that it is in the best interests of the child for the child to have access to both parents. That becomes an ideal which we, as legislators, have said.

It further goes on to say that there is a degree of co-operation required in the best interests of the child which flies in the face of the ability of the two parties to co-operate. That is a disturbing component that flies in the face of what is in the best interests of the child, because it is already preordained, in a sense.

The second question I have that I am going to focus on is with respect to child advocacy and the degree to which our court system accommodates legal counsel for the child. We know that in cases of complete frustration, the judge can indicate: "Listen, this child needs protection. I'm bringing somebody in. I'm no longer taking that responsibility, because if I do, I'm going to make some statements I'm going to regret here."

Yet it seems to me that instead of moving in that direction, we seem to be moving in a direction where, by agreement, everybody still says, "Yes, there are problems here and, yes, maybe, but courts still are ultimately going to have—" We are almost taking the child a little step farther from really his safest place, as a clearly defined vulnerable person in society, before our justice system.

Mr Kelly: Just very briefly on that point, it strikes me just listening to you that, given the jurisdiction over children, it is entirely conceivable that legislation could provide specifically for forms of dispute resolution, in the first instance outside the court, with a mandatory requirement that the child be represented in that mediation or in that arbitration, if we want to call it an arbitration, although it is probably not an appropriate method, but that in the mediation the interests of the child be independently represented in every event where there was a mediation so that you address some of the concerns you have about parents being required—

Mr Jackson: It was on that point. Do you know of jurisdictions where that model is used? That was my second question to you.

Mr McGuinty: On a point of order, Mr Chairman: I wonder if my colleague Mr Jackson realizes that there is a session to be held dealing exclusively with the matter of—

Mr Kelly: I was going to say I think that is right. There are people who are coming who are certainly experts in the area, but it is a question that—

Mr McGuinty: I am not implying that you are not.

Mr Kelly: Oh, I am not. I can tell you right now I am not, but I think it is a question that requires an answer. As I was listening to you, I was going through mentally the list, and I think in fact there may be more than one person who may be able to address that specific issue.

Mr Jackson: Thank you very much.

The Chair: Mr Fenson, do you have a wrapup question?

Mr Fenson: I just wanted to ask whether you think that a legislated code of procedure for various ADR methods is a desirable part or a necessary part of the future picture.

Mr Kelly: In certain types of disputes and in certain types of monetary jurisdictions, I can see a great advantage to legislation. I give you the example of wrongful dismissal. Another example, in my view, is this whole question of family. I can see circumstances in which certain aspects of personal injury, as I have mentioned, could be easily dealt with by experts, including my partner who was here yesterday. At the risk of being self-serving, he and many others can deal with that area.

Yes, I think it is appropriate in cases where the issues are not issues of public importance, are not constitutional issues, they are not issues involving serious gaps in credibility, let's say, all of which will always have to be tried, in my view, in the courts. But there are all kinds of situations you can think of, typical lawsuits, that do not require the full-blown process.

Mr Fenson: I guess the other part of my question is, do you imagine a time where certain types of disputes will actually be taken away from the courts formally?

Mr Kelly: I can imagine the time, certainly, because it has happened before. There are two ways, of course, to do it. It can either be part of the court system saying, "We're going to move this issue to arbitration or mediation, at least in the first instance," or I can see circumstances where, if necessary, legislation from the appropriate jurisdiction would simply say, "You will try these cases in this manner," and maybe have,

if necessary, in the appropriate cases, a safeguard in terms of some kind of appellate procedure that might involve the courts.

The Chair: Mr Kelly, I want to thank you very much, on behalf of the members of the committee, for a very instructive dissertation and question and answer period. I think it has been very helpful to us. I am sure that when we write our final report, the transcript of your testimony will be very useful to us.

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Our next witness is Ernest Tannis, who is an Ottawa lawyer, co-founder of the Dispute Resolution Centre for Ottawa-Carleton and executive director of the Canadian Institute for Conflict Resolution. Probably his most significant qualification is that he happens to be a constituent of Ottawa West. Mr Tannis, do you want to go ahead and proceed?

CANADIAN INSTITUTE FOR CONFLICT RESOLUTION

Mr Tannis: Mr Chiarelli, I could say that my mind is bubbling and my heart is weeping with joy. I have a feeling that in this room there is another ripple that will become a wave that will help wash away unresolved conflict from the shores of injustice in this country.

Before Mr Kelly leaves, I want to say I am not surprised you are impressed. I had the honour of practising with both Mr Kelly and Mr McMurtry. They are leading thinkers in the field. If he is young at 16 years, I am only at 12, and it a pleasure to have seen you again, John.

I have a number of approaches I was going to use, and I was just so taken by the substance of the questions by this committee that I have written down my own sense of about 15 answers. What I would like to do, if I could, is take you through some of the materials that I have presented to you and just take a couple of minutes on that.

I have had the absolute pleasure of speaking around North America at panels of one to 1,000. Whenever I am asked how much time I need, I say, "One fellow said, 'If you can't strike oil with the time you are given, stop boring.'"

The Chair: If I can interrupt just for a minute, and it is in terms of your referring to the small amount of time left, I am assuming that we will go until maybe 12:30 or 12:45, so the extra time we gave Mr Kelly we will make up with you.

Mr Tannis: That is wonderful; thank you very much.

Mr Jackson: But we are going to hold you to your statement.

Mr Tannis: That is fine. I spoke to 30 guidance counsellors last year with relation to our children, which I am going to have most fun talking about, and they said, "How much time do you want?" I said, "Anywhere from three minutes to 33 years will do for this topic."

I just want to clarify. You do have, I think, a copy of this book, *ADR That Works*—I am going to talk about how that came about, a package of materials which has articles—the Canadian Judicial Centre, which outlines a lot of things that are happening in the judiciary, and a background to the institute. I also handed out this morning some overheads that we did on conflict and a continuum in Canada that I have been using, and also a very important package that I am going to be referring to which, as politicians, you will be interested in. It is probably one of the most significant events, we think, from a people's point of view, because the theme that we have been working with is, "Justice...is just us."

I come here with no credentials and no established organization. Anything that has happened in relation to the story I want to share with you about Ontario residents at work in their community, in their region, in their province, in this country, and indeed in this world, is an exhilarating story. It is a story of upliftings and not uprisings, documented in Conflict Resolution Day of Ottawa-Carleton in September of 1988. Every level of government was represented. The Ontario government took a great lead in this and I want to talk about that.

I also have handed out Ten Reasons for Instituting a School-Based Mediation Program, which I think is one of the most fabulous developments in our modern day. Last I handed out 22 specific recommendations that we think the government of Ontario might want to take in this field and I would like to touch upon that in the brief time.

I first of all want to thank the hospitality and courtesy of Mr Arnott and Susan Swift and your staff. It has been a very warm welcome, and it is my first experience before a government committee, so I am a babe in a woods here and I appreciate the warmth and the real care that I hear about this topic.

As a lawyer, I have heard a lot of things, and you may have heard about this famous picture—it has been in my office for 12 years—about two farmers fighting over a cow. One farmer is pulling the head, the other farmer is pulling the tail, and right in the middle there is a lawyer

milking it. I always say to my clients, "If you want to litigate, be my guest."

What is happening here? It seems that what is happening is a paradigm shift. Because Mr Kelly has done such a great job on specifics, I would like to take a little bit of time to talk about a paradigm shift that is occurring. What you are talking about here today, it occurs to me, and from our observations, is part of what has been held by social scientists as one of the most profound social movements of the modern day.

There were a lot of great questions asked, and somehow I feel a little bit like the flock of birds in a storm of activity and information. The garage door is open to provide shelter, but because of the noise and the light, there is a little bit of confusion. So as I settle into this discussion, I am going to get through some of this and then settle into the warmth of the topic.

As for the priority that should be given to ADR, I heard a scientist at the International Joint Commission between the United States and Canada say that the two most important issues facing mankind for the balance of this century are the environment and ADR. In reflecting on that comment, it occurred to me that, philosophically speaking, environmental issues urge us to get back in harmony with nature; these ADR issues urge us to get back in harmony with each other.

It seems to me that if 20 years ago environment was not on the political agenda and it took time to get there, then somehow, by analogy, ADR seems to be in that place, but there is an exponential movement in terms of ADR. My philosophical sense in talking to other scholars in the field is that if our legislators could help merge the philosophies of these two movements, we will have before us a much more civilized world, a world much more in harmony. It is all part of that paradigm when we say we are talking about the search for truth.

When I first started practising law, someone knocks on your door and it is either the plaintiff or the defendant and you have to be partisan and you think there is one side to a story. Then you learn there are two sides to every story. Finally I learned there are three sides to every story: your side, my side and the facts. At a pre-trial conference a judge had that on his wall. I thought I was being witty and I said, "There are four sides to every story, Your Honour." He said, "What's the fourth?" I said, "How the judge sees it." It did not help my pre-trial conference, but I did say—really, there are five sides to every story: There is your side, there is my side, there are the

facts, there is how the judge sees it and then there is the truth.

What ADR is doing, it seems to me, way beyond mechanisms, is getting down to the truth, getting into a paradigm. We are moving from the idea of rights to the idea of interests, from win-win to win-lose, to disputants' satisfaction.

Someone said, "I want to be heard." One of the great opportunities I had in the last three years was to speak to 110 native Indian educators in Trois-Rivières, Quebec. As I got up to speak for an hour, I saw their sign. The theme for their conference was, "I hear a new generation calling." It struck me, what are our children calling for? I think they are calling not just for headlines that are sensational about conflict, but to align our heads about sensible conflict resolution; not just problems but solutions. They are crying out for justice. When I get into our story, I will indicate the movement in Ontario and around Canada in terms of our youth in school programs.

ADR is an awful term. You were talking earlier about initials. I always found it interesting that barrister and solicitor is BS by abbreviation too. ADR is like McDonald's. It does not mean anything by itself, but it stands for something.

What it is not is a panacea. It is not, in my view, an alternative to litigation, although that is how it started; it is an alternative for people. It is options for people to have in their daily lives on how they want to resolve their disputes.

I have heard this quite extensively around North America, and when I talk about the Tourism Canada contract later, in terms of that portion I will indicate that I just came back in December from going to eight American cities in 10 days, with bronchial pneumonia to follow. I saw 25 American scholars on the subject. One thing they kept saying to us was, "Don't fall into the trap that we have here." They have an unfortunate rift between the bar and the ADR community. There is no rift. If you look at any of the continuums, what is happening is that there is a continuum, as it seems to us.

One of the points I picked up which I think is important to state is that we are not in a litigation society—that is a myth—we are in a negotiation society. I have been trained as a lawyer to think adversarially. You start a statement of claim and you stop negotiating. That is not the fact. The fact is that we have negotiation and then we have mediation. What is mediation? Mediation is assisted negotiation. Then we have litigation. What is litigation? Litigation is forced negotiation. Negotiation never stops.

Some of the thinking that is going on is, is there a difference in our world today between spouses negotiating with each other and world leaders negotiating with each other? All the work that is coming out is saying maybe there is not a difference. If we can get a handle on that and look at the statistics, maybe we can reinterpret them in a better light if we see them in the new paradigm, if we look at it in that light.

When you look at the statistics that only five to 10 per cent of cases get to trial, what does that statistic mean? It means that 90 to 95 per cent of cases get settled. So why is it that when a businessman goes to a lawyer he hears, "Let's sue," and the day before trial he hears, "Let's settle"? When a dispute is handled, why is it not, "Let's settle," at the beginning?

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A professor in the United States did a fantastic study on when disputes get resolved in our system. Every time there is an intervention, cases either get settled or withdrawn. We have to understand ADR simply as a philosophical expansion of interventions. So the pleadings, the discoveries, the pre-trials, the offers to settle, all of those things are interventions. They are all part of ADR. ADR then is not an alternative to litigation; it is an alternative to trial.

This book is from the state of Hawaii. Here is a state that has an entire state-supported ADR system from the community up to the legislators' level, and they take it as an alternative to trial. Trial itself is an alternative if you want somebody else to make the decision for you.

If I can just finish quickly on the introduction of the continuum, a lot of theorists are now saying that conflict is ever present, but before we just do conflict resolution, there is something more important—conflict prevention. This is where government should really be spending some time, in our view, not just in the continuum after the dispute gets started.

As the Attorney General, who has taken a great lead in this province, and I think in this country—and we highlight him among others in our book—said, there was a study done by this province. Only one third of the disputes in this province go to lawyers. What is happening to the other two thirds? This is what this government, I think, should be addressing, what is happening to those. There has to be a way to provide alternatives and to look at conflict prevention. There are specific ideas on how that could be done. Some people say there is conflict elimination.

The Attorney General said in his statement in the Legislature which led to the report of the Ontario Courts Inquiry that the adversarial philosophy is no longer applicable in the late 20th century. That thinking is being shared internationally.

What it seems to us is happening is that people are being asked to think. Futurists and students of civilization have said there are three stages in mankind's growth: agricultural, industrial and informational. We are in an informational age. I understand that there has been a complete study by the federal government and other governments in the world on how governments today position themselves for the 21st century.

The first issue that I have heard is information technology. I have also heard studies—and I think this would be an appropriate time to mention this study in terms of the context as I understand ADR. People have studied the development of the automobile industry, the computer industry, the calculator industry and all those industries.

What happened from stage one to this stage? It has been evaluated that in those industries there are always three stages. There is one per cent to two per cent of the population who are visionaries, who are pioneers, who can sense the concept and see that it works. This is very true of the automobile industry.

Then it gets to a stage of inquiry, infrastructure, where 10 per cent to 15 per cent of the population start getting involved, and that is the stage where governments apparently get involved. That happened with the automobile industry.

Then the third stage is widespread public acceptance in terms of a need. Have you ever heard a person say anything today other than: "I need a calculator. I need a computer. I need a car." That was not always the case. Students of this study, of the growth of industries in the 20th century—and I tried to look at this before I came to the committee today, to get some input—feel that ADR is at the second stage, government infrastructure.

In terms of the next stage, widespread acceptance, you might know the story about the 100th monkey legend, which people also talk about in terms of that third stage, where the mother monkey tries to teach the millions of monkeys in the kingdom how to wash a fruit before they eat it. So every day she sits down with one monkey and teaches him how to wash a fruit. He learns. The second day a second monkey learns. Nothing different. One day, for whatever reason, when the 100th monkey

washed the fruit, the whole monkey kingdom understood and moved. This, as I understand social scientists and anthropologists, is where ADR seems to be sitting, the second stage of industrial development.

If I look at automobiles again, governments always look at building roads and highways to service automobiles. If, analogously, there is an ADR philosophy in this social movement at the second stage, I think what this committee is being asked is, how do you build the roads and highways to fulfil the movement towards that sense of justice in the ADR movement?

The last general comment I want to make before I get into a specific story and start answering some questions, some excellent questions—and I am glad I brought some of the literature I did—is when I was trying to figure out these things, I talked to John Sigler, who is one of the world's most respected political scientists and who is always on Canada AM analysing the Middle East; he has more Canada AM cups than anybody.

He said that this is not a question of our nature; it is a question of our culture.

Mr McGuinty, there is one thing I want to mention for you here, if you are leaving.

Mr McGuinty: I will be back.

Mr Jackson: You are not one of his constituents; that is for sure.

Interjection: If you do not live in Ottawa South, I can get you his address.

Mr Tannis: I have some good news for you about Ottawa South too. This place is on the move. I was going to take my jacket off because I have a feeling that we are going to get down to work in this country on ADR.

There is one short story I want to tell that maybe puts it in a general perspective that ADR is being perceived as a general rethinking, the story of the turtle and scorpion. When the scorpion asks the turtle to take it across the lake, the turtle says, "No, why would I do that? You're going to sting me and I'm going to die." The scorpion says, "Why would I do that, because if you die, I would die, I would drown." The turtle says, "Oh, that makes sense." Halfway across the lake, the scorpion stings the turtle. Just before they both drown, the turtle says: "Why did you do that? That wasn't logical." The scorpion says: "It has nothing to do with logic. It's in my nature."

Whether the adversarial competition or judicial system, whether it is strikes, wars or courts, it is the two-fisted approach. As you mentioned, we have been growing from that. Is that the case?

Well, according to the writings by Tolstoy and Gandhi, and according to John Sigler when I talked to him, it is not in our nature, it is in our culture. All the thinking that is going on in ADR now underlying this is that we are rethinking our approach to things. So maybe we used to be like this. As I said to the national executive committee of the Canadian Federation of Labour with a fantastic contract—one I will tell you about—we may be at this stage in the world: yes, we have to work under the shadow of court; yes, we have to work under the shadow of strikes; yes, we have to work under the shadow of arbitration. But I have got a handshake, I have got another alternative here. It is called peacemaking. There is another way.

Maybe one day we will be like this, hugging each other, but I think ADR is proposing this: that all tiers of society—and enthusiasm has been our fuel and faith has been our compass. I want to tell you simply a story now, a story of people at work and how I came to be here, which I think puts flesh to this. Before I tell the story, I am afraid about our time. I want to answer some specific questions, some very important ones you raised. There are about seven questions that have come around this table and I think there are a lot of interesting answers.

One of the first recommendations in my list is to set up a permanent task force committee, not just with the Attorney General's office. This issue strikes all tiers of society. One of the questions that is plaguing ADR is credentials. How do governments say, "You can use this person and that person"? One thing I found about this field is it is so fluid. As we are talking today, something else is happening and people in the field do not even know. There is literature available.

On your point, for example, the National Institute for Dispute Resolution, a very wealthy body in the United States of America funded by major, major groups, commissioned the Society of Professionals in Dispute Resolution to study the answer to that question. They took two years and this is their report. This report was made for legislators; this report was made for policy-makers. How do you answer that question? I will leave this report with you. Whatever these questions are, I think what the committee should do is look to striking a permanent committee to look at all of this.

Let me tell my story, which really has been a joyful experience. When the Attorney General struck the Zuber report, a group of citizens got together. I originally got involved through a man

who came to see me about helping the orphans in Lebanon. My father was from Lebanon. In my law practice I dealt with a lot of tragic cases there. We talked about how we as individual citizens in the world could do something. Was Ferenz right when he wrote in his book *Common Sense Guide to World Peace* that world citizens by the end of this decade, with or without their governments, are going to move towards peaceful resolution of conflict? Or can we work with our governments?

I learned from the Martin Luther King workshop that in social movements, especially in today's thinking world, if grass-roots people—whom hopefully I have the honour of being somewhat of a spokesman for from our community—can work in tandem with our legislators who will think in terms of the international community, it is amazing what mountains could be moved.

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I remember what Kahlil Gibran said about people of Lebanese and Syrian descent maybe being partisans of peace in the East, contributing to our society. As an Ontario resident working with citizens in this field, I found that there was a great urge to work together to do something. So a group of citizens, a motley crew of all professionals and stripes and secretaries, got together and we made a submission to Mr Justice Zuber on the role of individuals. I had the pleasure too, as did Mr Kelly, to be at Ian Scott's conference on access to justice on a panel on what role ordinary citizens can play in the movement towards peace. After that, we decided that maybe we can do something more. So we created the Dispute Resolution Centre for Ottawa-Carleton.

The first time we heard about this thing called ADR was about three years ago. It was like a peephole into a whole flurry of activity. It was in a briefing memo to the Prime Minister, for example. Afterwards we had a message for our conflict resolution day. We thought that the processes of peace were now being tied in real world ways to the principles of peacemaking. It is like a plug in a socket: it is very electrifying. So as a small group, we said, "What can we do in Ottawa-Carleton?" We decided on three programs. Working with our schools was the most exciting. I have a whole book here called *Mediation in Education* and some great stories about what is happening in Canada in our schools that you may or may not know about in Ottawa West, Ottawa South and somewhere in Toronto.

We discovered that in the United States of America, starting in Hawaii eight years ago,

conflict resolution curriculums and peer mediation programs were instituted in schools. It was a phenomenal thing to hear about. Suspensions were down. Juvenile delinquency was down. More important, kids were learning to be citizens of the world, how to talk to one another, how to avoid fights in the school ground and how the climate of the school can be different.

Thanks to the Ottawa Board of Education and Woodroffe High School, which is in your riding, the first peer mediation program was launched in Canada at Woodroffe High School. Ivan Roy was the vice-principal. He was totally against this, and there is nothing better than a "no" when you want to start to do something. I have learned that. He said: "There's no way. Suspension." Suspensions, strikes, wars, courts. "Suspension. That's the only way. I have been a vice-principal for 35 years." At the end of two and a half years, the bottom line of this story is that Ivan Roy has now resigned from Woodroffe High School, and starting this June he is spending the rest of his life promoting school programs in Canada on a full-time basis with our institute, because he saw it work. The climate of that school is different. The principal has said that suspensions are down one third.

Do you know what is sad, though? About a year and a half ago, you might remember, high school students in Halifax were in a fight. They got national headlines. That same week in Ottawa, there were 40 kids in a fight on the Woodroffe High School campus. There were police cars, chains. It was a boyfriend-girlfriend dispute, but it was going to be horrible. The kids were courageous enough to go in and they mediated the dispute with students we had trained. They tried to get the media involved. Not interested. The kids said, "Is that not newsworthy?" Rethinking.

I lost my frustration, though, because I finally realized that the two best signs that these things were meaningful to our world was that the media were not reporting it and the government was not supporting it. I said, "These must make sense," not as a critique, but it takes time for those agendas to be attracted to the reality of a movement.

You will be very pleased to know that Woodroffe High School was represented at a prestigious conference in Washington, DC. If you looked at who was at this conference, there was every major educator and thinking body, supported by the White House, on the meaning of education in mediation in our schools, and we were there.

Two other things happened there that I think are important to indicate in terms of our story. We had met a playwright from Hollywood, California, through another mechanism not involved in believing in our work. We did some presentations to Hollywood playwrights on bringing this into theatre and movies in Beverly Hills about a year ago. This man, Bob Ellis, wrote a playlet for us called *Summittime in the Park*, 30 minutes long, three scenes, only three characters. In the first scene two guys are fighting to control the street as gang leaders, with a third woman with a baby trying to stop them. They switch costumes right on stage. They become two world leaders in conflict with a third-nation mediator. We made the mediator Canada. They switch costumes on stage again. They become a husband and wife in conflict in a park and a stranger is a mediator. I was taken by this playwright's grasp of the interrelationship between interpersonal and international conflict.

Now, leave it to the Americans. I sent that script to the head of the American Bar Association heading up this conference. You know, they flew in the actors and actresses from Los Angeles and opened this conference with that play. Judge Frank Evans, who you will see at the back of this book, a big supporter, was really impressed with that, the role of plays and theatre. He said as we talked, "How could we take these things from our schools into our community and talk about them, because nobody wants to hear lectures?" So we conceived of an idea called conflict resolution days, and you will see in your material that we did the first conflict resolution day, which we hope will be one of many around municipalities, Conflict Resolution Day of Ottawa-Carleton.

I want to tell the story about this, because for me and for the people we have been working with, which is hundreds of people, coming to see that within each person there is a spark from a common flame, there is something happening in our society that is very meaningful. It is fantastic that this government is looking at it, because I believe, from what I have seen around the world, that this Ontario jurisdiction can take a major lead in this world and in Canada—for business purposes too.

"Justice...is just us" was our theme. We were the only group ever to get the Canadian Government Conference Centre, thanks to Ray Hnatyshyn, who was then Minister of Justice. He gave his nod. I have come to learn that if you can get a nod from our policymakers, our influencers, our political leaders, it is amazing what

can happen. Ray Hnatyshyn gave us a nod. We went in there.

We got a message from the Prime Minister of Canada, and if you look at the speakers, the then Minister of Education, the member for Wentworth North (Mr Ward) was represented through Yvonne O'Neill; the Attorney General was represented through Steven Offer; the Ottawa Board of Education chairman was there; Mr Justice Allen Linden, president of the Law Reform Commission of Canada, was there; and at the Woodroffe High School campus, with 700 kids in the audience when we launched the program, he announced the new cheer: "Two, four, six, eight. Let's not fight, let's mediate." That came from Mr Justice Linden. They got a nod. The Canadian Bar Association was there, and the mayor of Ottawa.

One thing that was really interesting, you will see, is that all 11 mayors and the regional chairman signed a proclamation called "Justice...Is Just Us," which was handed over that night. The Associate Minister of National Defence was there, Paul Dick. Dave Daubney was there on behalf of the Minister of Justice, who sent a message, and flying in from Toronto to emcee the event was Eric Peterson, from CBC's *Street Legal*. That event is now going to be a book. It is coming out in six weeks.

You are going to hear from me when I talk about the Tourism Canada contract that the city of Surrey is the next city in Canada that is going to have a conflict resolution day. But what that event said to us was, there is something hopeful happening in our society which, hopefully, our legislators and our bar and our community will look at.

As a result of our work with the dispute resolution centre and this kind of activity where we had the Ottawa West Rotary Club help set up the school program in Woodroffe, in Ottawa South I had the pleasure last November of speaking to the Ottawa South Rotary Club and last week Ridgemont High School decided to take on a peer mediation program. That is after 10 schools in Ottawa were exposed to this. There are about four schools in Toronto, in some of your jurisdictions.

One of the recommendations at the end was for, hopefully, every MPP to get to his constituents, maybe through newsletters, to find out what is happening in the constituencies. There are four schools in Winnipeg, there are eight schools in Vancouver. There are 12 conferences going on in Canada—I left this information with the clerk of the committee—and one of them is Canada's first

national conference on mediation and education, because we find out we are going to learn by teaching our children.

Talking to lawyers who have been out 20 years, and other people, I mean, it is sometimes like teaching a dog new tricks. But we are all parents, lawyers are all parents. Are they going to not want their children to learn conflict resolution skills?

1210

What we discovered was that when we went out to get more information and found books like *Dispute Resolution* by Sander, which is being used in law schools—I am teaching a course at the University of Ottawa law school with Julien Payne now for second- and third-year law students, which is great—books like this, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, for governments, policy-makers, industry leaders. I want to tell a story on how we used this with the Canadian Federation of Labour in the last year, books like this, *Conflict Management and Problem Solving: Interpersonal to International Application*, for all people at all levels to look at.

As we came across all of this literature, we said: "How do we, as a small group, handle all this? How do we apply it in our communities as people? How do we work with our government leaders and our lawyers?"

We looked around and a lot of professors, especially theologians at St Paul University, who did us a great favour—they did a study of our group and they put it in context of a world movement, what is happening in Canada, what is happening in the United States, how the thinking started decades ago and how we fit into that. St Paul University agreed to take us on, to give us some office space.

We looked around for a national body to help service this, to help encourage interdisciplinary studies, to work with governments on a national and federal level and on a provincial level to get information out. No such body was found. So we created the Canadian Institute for Conflict Resolution. It is like the child gave birth to the parent.

All of these things, of course, are like giving birth: They are easy to conceive, hard to deliver but well worth the labour. And that is how we feel about this, because we see it working with people, but at the Canadian Institute for Conflict Resolution, we are working on a shoestring budget and we borrowed the shoestring. Is that not the way it should be if it is going to make sense?

I cannot possibly list the number of businessmen, lawyers, judges—Mr Justice Marshall, the head of the school for all the judges in Canada, is supporting us—all supporting us, community-based support.

Last fall, in order to continue our work, the Donner Canadian Foundation, which the scholars say is the blue-chip foundation, one of the most prestigious in the country, decided two years ago that foundations should support this field of ADR, so it decided to support the field.

There were 24 or 25 major ADR groups in Canada. We are johnny-come-latelys. You are going to be talking to Dean Peachey this week. He is a fantastic fellow. In fact, I asked Dean Peachey, what can a johnny-come-lately like me do in this field? He said, "Ernie, why don't you help spread the message," and I have taken that as a mandate. I have avoided carrying on with my general law practice and commercial work and found myself participating, not anticipating, and becoming executive director of this organization, which is a journey that I feel comfortable doing. I am grateful for it and honoured for it.

To our pleasant surprise, the Donner foundation awarded our institute \$250,000 last fall to carry on our work in Canada for three years—also a statement to government, to foundations and to people that these things are worthy of support.

What I have discovered with groups like the National Institute for Dispute Resolution is that they have millions of dollars they are handing out. You have heard about how the United States has set up programs. Well, where do governments get the money? A lot of the money they are getting comes from foundations that believe in this stuff—people. For every so many dollars a government puts in, these foundations are putting money. The Donner grant has come through. All through the west—the Law Foundation of British Columbia has put \$200,000 in. I believe there are lots of sources of funding for this stuff.

On an international level in terms of funding in the same area, to keep the connection, I discovered in our North American research that I just came out of that there is a new organization called the International Negotiation Network. Ex-president Jimmy Carter, Harvard University and another group are doing fantastic behind-the-scenes work. They are getting millions of dollars in funding, but it is very quiet. One of the things I have learned in this work is that one of the agreements between parties is they do not discuss any of this with the media, which is maybe one reason the stories do not get out, although the

solutions are getting out, because there are publications on it. We discovered that with the International Negotiation Network, down to the community level, these things were taking place.

The third component of the institute was an interuniversity consortium, and I am pleased to announce that, as of two weeks ago, after two years of negotiation, Carleton University has agreed to have an interuniversity consortium for interdisciplinary research in Canada to service government, to get answers, to do underlying thinking behind this. We already have 20 scholars across Canada who have agreed to be fellows. A number of the people you are hearing from in this hearing are fellows in the institute, and they are fantastic witnesses. You are going to hear from a lot of them, but that is saying that there is now a forging of the theoretical underpinnings with the practical application.

I do not know about policymaking by government. You are the experts. I am president, and it is an honour, as Mr Justice Linden says, to be of public service, but I would gather that in order to make these kinds of substantial policy decisions you are going to want to make, you are going to want to have access to this kind of information. I am pleased to report that, not only with our group but with a number of groups that have formed in Canada and did the National Consultation on Conflict Resolution, there are tremendous amounts of groups and businesses and established people who are ready to support and provide that information.

With the work on the international level, we conceived of an idea called UNICRY, United Nations International Conflict Resolution Year, for 1992, the 125th anniversary of Canada's Confederation, the 500th anniversary of when Columbus discovered America and when barriers come down in Europe, and there are many groups around the world working on that.

I wanted to take this into a practical field. I am pleased to say that I have been given permission from Tourism Canada and the Canadian Federation of Labour to report the results of two contracts, which has taken 15 months of work, thousands of hours.

Tourism Canada wanted to explore—and the connections were very interesting—how can the tourism industry apply ADR? I had not thought of that connection, and it is interesting how it came about, but that is another story. In the last year, we did a briefing memo for Tourism Canada. We took a lead from this book, and one of the recommendations in the list is how

governments could look at their own departments.

I would like to say we should move from NIMBY to YIMBY, not in my backyard to yes in my backyard. The best place to start is with ourselves. In all the literature, there is tremendous opportunity for governments to apply these things within their own departments and with their relationship with the public in terms of complaints and compliance requirements.

With Tourism Canada we said, how could we help think out how an industry could use this work? We did a briefing memo studying the field, philosophically, intellectually, practically, looking at industries like insurance, the automobile industry, which has used it successfully with great cost-cutting measures, and studied the mandate of the tourism industry.

As a result of that briefing memo, we were then commissioned with a \$100,000 contract, using an international expert in tourism, to do worldwide research with a view to—and this is a gift from Canada to the world from Tourism Canada and one bureaucrat with vision, which I originally thought was a contradiction, but it was wonderful to see courage and foresight. His minister, the Minister of Justice, had to prove this to the Prime Minister's office.

We did our research and we were looking towards whether or not we can introduce this idea at a Pacific Area Travel Association conference. The world's largest travel association is meeting in Vancouver this April, 3,000 delegates from around the Asian Pacific rim, who represent 40 per cent of the world's top corporations. As of yesterday, I got a fax saying that we have now gone through the second stage. It says we have now been authorized to go to that conference. I am going to be doing an address to the 2,500 delegates on conflict resolution, both as a theme for world peace and how it can be used in practical terms.

What I found out was that tourism makes money for a society. When I talked to the fieldworkers last week, they were grateful to hear that this initiative was taken. We are doing workshops and we are going to do a panel discussion at the end.

We also did a contract with the Canadian Federation of Labour, for over a year, and I had the joy of working with Bill Kelly, who is one of the most respected mediators in the country.

Mr McGuinty: With a name like that?

Mr Tannis: He was called a prima donna.

While working with Bill Kelly on this—and you talk about criteria. He is a governor of our

institute and he helped endorse the book. He said to me at dinner—I asked what degree did he have—“I have my GTD, my grade 10 dropout.” It is a good thing they did not have credentials for him.

But thanks to Bill Kelly and labour experts around Canada, we did the same thing, we followed this thinking process, which I think governments can do with their departments. It is called dispute resolution system analysis. It is in addition to conflict resolution—conflict prevention, conflict maintenance—and it can help a society not only save money but make money, especially in tourism.

All of a sudden things start to fall into place. Tourists come to our society. They are not happy with something. They usually do not come back, or travellers come back and they have a problem, and if there is a lack of goodwill, there are a lot of things happening, but there are things that government can work on.

Tourism Canada took this lead, which the Donner foundation thought was a very important one, and as far as we know, in the international community there was no other initiative like this.

With the Canadian Federation of Labour, we had the opportunity with labour experts and Bill Kelly to study labour-management relations and see how the ADR principles and philosophies could merge with co-operative labour-management to avoid strikes and cut down on grievance arbitration.

We did a complete study. It was a 150-page study and last December—Bill Kelly was supposed to come but he could not make it, so for me it is like the chickadee talking to the eagles on this topic, because we are with experts here, but we are talking about principles that apply—I had the pleasure of talking to their national executive. I am pleased to report that they have unanimously approved recommendations to explore how these things can help labour-management in our country, which is a great saving.

One aspect in this whole field is joint negotiation sessions between people on opposite sides, labour and management. In fact you may know, but there has been a whole developed negotiation planning strategy for politicians and diplomats. One of my recommendations, one of the 22, is for the committee to look not only things at it can do intergovernmentally, but other training sessions and seminars the committee could take for itself in terms of public policy decisions and so on.

The last comment I had with tourism is that when we are looking at public policy disputes,

environmental issues and so on, some of the biggest problems in this country are environmental issues, which ties into tourism development, and there are labour-management issues. There is a tremendous amount of activity in the field beyond and in addition to mediation, arbitration and facilitation of public policy decisions.

There are some fantastic stories. There is a whole publication in the United States that goes to every government legislator. In fact, Larry Susskind, with whom I was on a panel last year on the role that lawyers can have in the future, is spearheading public policy for legislators and he asked us to make it a North American magazine for all legislators. You will be interested to hear, if you want Larry Susskind's tape, on that panel he predicted that two thirds of the lawyers will be out of business by the end of the century when the public catches on to what is going on. He was being more vituperative than anything else, I think, but I have that tape.

I should wrap up in a couple of minutes.

Mr McGuinty: I would like that.

Mr Tannis: It is a very good tape.

One of my other recommendations, when I thought of it—I do not know if you are going to be doing this, but in my teaching for Carleton University and the University of Ottawa last year, I found one of the great tools in this field is that there are a lot of videos on this stuff. I just put a video on yesterday, a half an hour on how a mini-trial works. There is another video that Judge Evans, from the state of Texas, put together on five ways that these things work, so if there is time here later, there is access to videos where you can watch some of these processes at work.

I am not sure when we are cutting off here. I had another, say, 10 minutes.

The Chair: I am in the hands of the committee. I thought it would be very useful for the committee to have at least some time to have some interchange with you, questions and answers. What is the bounds of your 10 minutes?

Mr Tannis: I could take two minutes on the balance. A lot of members had a lot of questions and I put down a lot of things that I have been anticipating providing some dialogue with in terms of specific questions that were asked of Mr Kelly.

For example, you question my credentials. There is this document which is terrific for policymakers. And other questions—

Mr McGuinty: Let the record show that Mr Tannis has referred to me as the questioner—

Mr Tannis: I have identified seven questions, and that was the first one that came up and it was a very critical one. I am fortunate I found this before I came here.

The Chair: Quite frankly, I see no objection with your answering the questions that were put to the previous witness by the members of the committee. Maybe we will have time afterwards to add a question or two, because I think most of the questions that were asked were very relevant and they would be relevant to pretty well any witness who comes before us. Perhaps you want to take seven or eight minutes at least and proceed to answer some of those questions quickly.

Mr McGuinty: I find Mr Tannis's exuberance and enthusiasm so contagious I would like to send out for a sandwich and keep right on.

Mr Polsinelli: Perhaps Mr Tannis will understand that some of us have appointments, but the committee could continue so that his comments would be recorded in Hansard. I am sure most of us would—

The Chair: Perhaps another alternative, again subject to Mr Tannis's time, is that we could perhaps reconvene at 1:45 instead of two o'clock, take up another 15 minutes and maybe borrow another five or six minutes from the other witnesses.

Mr McGuinty: For those of us who are addicted to food.

The Chair: Yes.

Mr Tannis: That would be helpful, because there are a lot of substantial things happening in Canada this year that I would like to bring to the attention of the committee.

The Chair: If the committee would agree, we could reconvene at 1:45 instead of two o'clock and we can continue with Mr Tannis. I will ask the clerk to notify the other members of the committee who are not here to be back for 1:45, when Mr Tannis will commence again.

The committee recessed at 1225.

AFTERNOON SITTING

The committee resumed at 1356.

The Chair: We are expecting a number of other committee members to arrive momentarily. However, because of the time constraints, I am going to ask Mr Tannis to continue where he left off before the break. We probably have about 10 to 15 minutes, I think, that we can eat into the other witnesses' time. If you want to proceed, Mr Tannis.

Mr Tannis: I shall make haste slowly and crawl, walk, run on this topic. I think if I can make one or two general statements, I can then go into the details and finalize the presentation. This is very much what the committee is doing, like the grocery boy who went in and delivered the goods and asked the merchant if he could phone his employer. He did, and he asked his employer if there was a job available as a delivery boy. When he got off the phone the merchant said: "Why would you do that? You already have the job." And the boy said, "I'm just checking up on myself."

I think what is happening with alternative dispute resolution is that we are checking up on ourselves. If it seems like a tidal wave, I think the mandate of this committee is going to try to harness it and make some energy out of it.

I will just take about two or three minutes on an overview, answer some specific questions that came up, run through recommendations and make one or two final statements.

I think the committee might want to look at this whole area, like the people who touched the elephant. They all touched a different part and thought it was something else. I think the committee is going to see the whole elephant and try to come to some of those terms today. I would encourage you to look at it the way we have been trying to look at it, with a telescope, binoculars and a microscope.

If I understand my science correctly, every particle in a homogeneous substance reflects the whole. The philosophy I am urging and have observed from the grass roots, and I think it has been documented not only by our work but by the literature and activities around the world, is that there is this interconnection happening.

From a telescope level, in terms of ADR, maybe one way to put it is that, as in a marriage, it is something old, something new, something borrowed and something blue. It is something

old because it represents age-old ways of resolving differences, from other cultures too.

It is something new because there are new processes that we are looking at. In a society that has polycentric problems, where the problems just do not affect two people any more, they affect other people, there have to be different ways.

It is something borrowed because, for example, last year in Hawaii the American Bar Association had as its main theme ADR at its international conference, Resolving Disputes in Pacific Ways. For the first time, the Asian Pacific Rim and North American cultures got together and discussed this topic.

And it is something blue because it opens up the skies. Just like there is an Open Skies conference going on internationally in political circles, this is open skies in terms of dispute resolution among people. I think looking at it in that dimension, there are open skies going on at all levels.

The binoculars are what groups and governments can do. The impression I get from going around and talking to people is that Ontario can be and is looked to be a thinking jurisdiction that can really do something positive about this. There is impact for Ontario, too. At one panel, for example, I heard that international business, which is the growing rage, is looking at, as a factor before it invests: "What is the dispute resolution mechanism of that jurisdiction? We do not want to get into it if we are going to be down in the morasses."

If you look at other provinces, like British Columbia and Quebec, the governments have financed international arbitration centres. If you look at symposiums like this and the Maine Law Review, when they discussed the free trade agreement on ADR, it is a discussion of how governments have to think in these terms. So from the binoculars point of view, there is government activity.

In terms of group activity, I just want to mention a couple of other things that are happening which I think are very important and meaningful. You are going to have a witness this afternoon, Paul Emond, who has been at this for a long time. He edited a book on commercial dispute resolution. I have that as part of your literature in terms of publishers and other groups, 10 or 12 people thinking in this field. There is a conference in Hamilton with the Unified Family

Court. I do not know if you are going to have a witness from it here, but that is an excellent jurisdiction. They are having a conference on alternatives to dispute resolution. I left their brochure.

In July this year the first national conference on conflict resolution is occurring in Ottawa for three days. Our institute has helped spearhead a panel called a JUST conference—judicial use of settlement techniques. Mr Justice Marshall, the head of the school for all the judges in Canada, is moderating. Judge Evans is coming up from the United States and we will have a judge from Canada, a judicial look at this thing.

There is going to be a performance of Peace Child at the Canadian Museum of Civilization, getting back to our youth. I really appreciate Mr Jackson and others thinking in terms of our youth and the important role they play. These are the kinds of things that are happening at the group level.

On a microscope level, it is individuals looking for options, and in our role today there is a basic thrust going on, empowerment. Some nations are looking for political empowerment, some for religious empowerment. In our society there has been an analysis that we are looking for economic empowerment. This ADR movement is part of an empowerment of individuals to have some say and satisfaction over the way they resolve their disputes and deal with their problems in their own lives, and it is part of that whole empowerment principle.

One of the general principles I have been urging is moving from NIMBY, not in my backyard, to YIMBY, yes in my backyard. In the 22 recommendations, which I hope the committee can take a look at at its leisure, there is a whole series of very specific things, from a royal commission between federal and provincial governments down to what the government of Ontario can do with its own front-line staff, with its own government departments, with its own legal cases and so on. I think these recommendations could assist the committee in terms of applying that, going from firefighting to fire prevention, from process to attitude, from tinkering to transformation.

The specifics of some of the questions, if I can just go quickly around the table—I could not get them all down, but there were some, I thought, that were very good. I have already dealt with Mr McGuinty.

Mr Smith talked about, in lawyers' views, what this does to their fees. I could mention that at our book launch for Alternative Dispute

Resolution That Works\$, on which there is an article in your publications, Jack Miller from one of the largest law firms in Canada came and spoke. He used the manuscript of this book in a Quebec superior court. He was the first lawyer in Canada to ask the court to take judicial notice of ADR. He settled a \$50-million law case when the other side saw the process of ADR. He is a 100 per cent practitioner in the field. He makes premiums because he gets his clients out of court, out of trial. They get things done quicker and faster. So there is a way in terms of explaining this to lawyers.

Mr Furlong talked about lawyers' training. Our view is that in this field a lot of it is conflict prevention, so there is a lot of training that has to go on. As I mentioned, there are a lot of seminars and sessions for politicians and diplomats that have been developed now in terms of public policy facilitation, consultation and so on. He also mentioned that statutes create business for lawyers. Every time I see a new statute, I call it a lawyers' employment act. I think that is the way the public sees it too.

Mr Farnan talked about a whole legislative response. You have your next witness from Washington. It is a wonderful place. Melinda with the multi-door courthouse, and Professor Sander and the American Bar Association—I mention this in the book—have been, for me anyway and for our group, one of the great encouragers and great aids on this. Judge Frank Evans from Texas is involved in the ADR committee of the American bar. Texas passed an alternative dispute resolution statute. They have settlement weeks, starting, I think, last year. This year is their second time throughout the whole state. All the cases go to a settlement week at the option of the parties and the lawyers.

Mr Jackson mentioned the blemishes and blessings of certain things. I think that is a good thing to keep in mind in terms of ADR as a whole, and the jury is not out on some of the questions you have raised. Again, there are some reports collecting dust. One of the recommendations is, get back to all the reports the government already has in the field. There is a report back in 1975 by the Ontario Law Reform Commission on your very point. You talk to Julien Payne and he still wonders why there are not these pre-trial conferences to look at breaking out all these things.

In Ontario again, there is the Windsor-Essex program, which Gordon Henderson will probably speak to this week. He is chairman of our board of governors, where the government of

Ontario has had past experience with these things.

Maybe I could say, finally, whether or not ADR is a good idea. There are six steps to whether something is a good idea, as I understand it. The first is, when you first hear it, does it make you feel, "Wow"? Does it tingle your spine? Does the concept catch your imagination? That is how we felt about it and I hope people here do too to an extent.

Then there is vow; are you committed to seeing it through? Hopefully after all is said, it is done. I hear that in some committees much is said and little is done. I hope that is not the case, but there has to be commitment to it.

Then there is now: Not let's put off to the day after tomorrow what we can put off until tomorrow. We have to do something now. I think this committee and this province will be looking at some immediate work in this field and at what pilot projects.

Next is how, not if. I would say if it stands for initiative, and initiative is okay, but it is how to do it, and I think there are enough people in the field, enough experience with the government to put that into place.

Also there is ow, because there is a lot of pain that goes into making things work, and I think it is worth it.

The last thing is pow. When you talk to someone about it, does he feel that it makes sense to him too? If that is correct, then maybe what Victor Hugo said may apply, that an invasion of armies can be resisted but not an idea whose time has come. I suggest to this committee that ADR, in a way, in the global, national and the whole context that has been described, is an idea whose time has time has come.

The Chair: Thank you very much, Mr Tannis. Mr McGuinty, you have a question?

Mr McGuinty: I think Mr Tannis has anticipated the questions I had raised previously and adequately answered them, but I cannot let a native of Ottawa go by without some commentary. I suspect that you are very supportive of the alternative dispute resolution idea. My comments will be mercifully brief.

I have not read your book, Ernest. I have been able to browse through it and I can judge your book pretty quickly and I think it is an absolutely outstanding contribution to the field. I think your enthusiasm is admirable. It is infectious, and it seems to me, as a native of Ottawa and Ottawa South, in which I have many Lebanese people, of which you are an outstanding member of that community that has contributed so much to our

life, and perhaps I am culpable here, but you have been hiding your light under a bushel.

I was not aware of the fine work you have been doing in the Ottawa area, and even my colleagues at Saint Paul University. I know now, and I am delighted to hear of it. I will certainly follow it up and hopefully become involved.

There is one aspect of this that really strikes me in a very compelling way and that is when I have constituents coming to me, sometimes poor, sometimes not, but generally speaking, apprehensive, intimidated and frightened by the law. Sometimes the only experience the ordinary citizen has of the law is in the traffic court, and the kind of alternative that you outline is the absolutely ideal substitute, if you will, to alleviate that concern.

You refer to something old and new and borrowed and blue. It reminded me when I gave a talk when my oldest son was married a few years ago. I referred to something old as the jokes he would tell, and something new as the stories as I would relate, and something borrowed as the suits that were borrowed by the groom and his best men, the ceremony. And for something blue, that was the bride's father when he got the bill.

1410

We started out here with Mr McMurtry yesterday and then Mr Kelly. We witnessed Mr Kelly's two presentations, which I thought were absolutely superb, because as an academic, he spent 31 years in the classroom teaching many lawyers—most of the ones around Ottawa. He got the blame or credit for that. I became very disenchanted over the years. What I perceived to be a lowering of the status of lawyers from that of an honourable profession, which implies an understanding of underlying principles, to a trade. I have seen this in my own family, in my own four sons who are practising law. The atmosphere is such and they do not get much support from either the law school or colleagues in the profession when they profess interest in this regard.

On a personal note, my brightest son, who after taking a civil law degree in Quebec and a common law degree in Ontario and the New York bar state exam, consistently in law schools for ever raised the question of the idea of, what are the underlying principles? What is the basis of law? From whence does law derive? After practising for a few years, in frustration he gave it up and went to the Ivory Coast to do volunteer work.

I recall having many long discussions with a very dear friend of mine about, how does law operate, how has it changed? His view is that one puts his finger to the wind to see which way it is blowing, then law makes the lawyers respond as sympathetically as a tuning fork. That story is all the more tragic in so far as my buddy happens to be a Supreme Court judge.

The kind of thing that you have outlined here, coming so appropriately timed after Mr McMurry, Mr Kelly, and I must say—I do not know if you are in my riding, Mr Tannis, but if you are not, I can get you an address for election purposes anyway. But I really enjoyed your enthusiasm and the vigour and this absolutely superb volume with your—I guess this is your kid brother's picture on the back, is it?

Mr Jackson: The whole family looks like that.

Mr McGuinty: Thanks very much. We are just delighted in this and very proud to have you come from Ottawa.

The Chair: We have two more questioners, Mr Smith and Mr Jackson, and I would ask if you could please be as brief as possible in view of the running time.

Mr D. W. Smith: I cannot be quite as good with words as my colleague Dalton, and I might as well say, Dalton, I only have two sons and neither one of them are lawyers.

Mr Jackson: You can be shorter.

Mr D. W. Smith: You mentioned during your presentation, and I certainly enjoyed it, we have gone through the culture era, industrial era and now we are in the information era. Do you see disputes becoming much more prevalent in this information era, as you referred to, and maybe how long are we going to last in this era or do you crystal ball at all as to where we may be going from this point on?

Mr Tannis: I would like to participate, not anticipate, but what Mr McGuinty said is part of my thought is that the law, like the traveller, must be ready for tomorrow. I see that the information that we are talking about here, these options and information, skills and ideas for people to prevent disputes, and when disputes arise, to learn how to violently disagree without being violent.

Mr D. W. Smith: So do you see this information era continuing for many, many years? Are we into this for many years now, in your opinion?

Mr Tannis: Yes, I believe that. I think that it is a matter of public education, and I understand

the government is going to embark on a decade of environmental education. I am glad you raised that, because one of the specific recommendations is that the government really assist in the information era in providing education about these things to the general public.

Mr D. W. Smith: Okay, thank you.

The Chair: Mr Jackson, I assume that you will match Mr Smith's brevity.

Mr Jackson: I think it is a mean average between the two other questioners, to be more accurate.

Ernie, all of us appreciated your presentation. You speak very much about a philosophy. You challenge us as policymakers to look at this in conceptual terms different from those which we have become accustomed to in terms of government policy. I think there is a tendency—some of us have looked at this—that we should look at it in a justice portfolio. I am excited by the notions that we should look at this beyond just its justice implications. There are other ministries with very valid applications for dispute resolution, whether it is Education, Consumer and Commercial Relations, any of those very ministries.

It strikes me that as policymakers we tend to be reactionary and deal with a limited vision of how to resolve disputes, because as politicians we ourselves fall into the trap of dealing with the politics of confrontation as a tool, whether it is for re-election or for extending strength as an image of our political decision-making process. What excites me is that perhaps the notion of alternative dispute resolution holds within it the hope that we can be more proactive and that that implies an integration with varying ministries, because if it is a philosophy, then its application applies across the board in all of our dealings as a government and all of our dealings as legislators.

Can you talk to us about what is needed to make that leap philosophically and in the thinking and also the breadth of involvement for the committee in terms of making sure that we are not tunnelled with respect to justice but have the capacity to look at the full field?

Mr Tannis: I promise to have a very quick answer. So I do not forget, I would like to thank this committee as a citizen, as a taxpayer and as an Ontario resident. It is not only great to be of service but to see how our legislators think out these issues. I have never been exposed to anything like this before. I am very impressed, and I am much more assured the way our legislators can in fact impact and work with the general public. I thank you very much for that, and I hope—Mr Chairman, your comment, I

thought, was very insightful in terms of what priority should be put on this—that ADR can be seen as a priority with environment, for the reasons stated.

Mr Jackson, in relation to your points, very quickly, the way I see it is that I often tell my children, “Never let school stand in the way of your education.” I hope, and I do not know how this works, that politics do not stand in the way of good public policies. The only analogy I can give that would make sense—when I talk to a fellow colleague in the law, and it is a noble profession, if we can get away from the myopia of looking at it in terms of enriching ourselves and look at it as enriching society. Every industry leader I have talked to in the last three years—and I have talked to all sorts of them, I am always trying to get ready to adjust to an audience, and I hope I adjusted to this one enough that it makes sense—I always understand there is a mindset that has to be crossed, as you say, in every industry. It is not just in politics. It is in industry, it is in education, it is with lawyers, it is with doctors in terms of health. All of these mindsets have to be crossed, and all I could do is remember what Gandhi said, “Let’s not try to change the world; let’s first change ourselves.”

In this industry, this most important industry, one thing I failed to mention was that in that second stage of analysis of growth of industries in the 20th century, the second stage required foresighted political leadership. Whatever it takes to cross that threshold, I urge you to do it. Those to me are personal, philosophical decisions.

The Chair: I just have one final question. Compared to other states and provinces, on a scale of 1 to 10, where does Ontario sit in responding to the whole ADR phenomenon? There is something happening out there. It is springing up like mushrooms all over the place. Where do we sit, as a government and a province, as a jurisdiction?

Mr Tannis: In Canada, next to British Columbia, I think this province sits very well. I think it is poised to be first and for everyone else to be tied for second if it can take leadership. In terms of a North American jurisdiction, in talking to a lot of the people in the field, some of them have said to me, because of what has been happening out of Ontario—and some of our literature reflects that, not only in Canada but I think other jurisdictions are looking to see what Ontario is going to do. I think it sits very high in that regard.

The Chair: Thank you very much. On behalf of the members of the committee, I really, sincerely want to thank you for a tremendous overview. I think you have given us tremendous insight into the dynamics of the whole area, and I am sure that we are going to see a lot more of you in this area in the future. So thank you very much for sharing your ideas with us.

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I would like to ask our next witness, Melinda Ostermeyer, to please come forward to the table. Ms Ostermeyer is the chief deputy clerk, multi-door dispute resolution division of the Superior Court of the District of Columbia. I would like, obviously, Ms Ostermeyer to perhaps expand a little bit on her background in the field as well, as she gets under way.

MELINDA OSTERMEYER

Ms Ostermeyer: I need to warn you I am known for my flip-chart fiascos here, so please bear with me. I am currently the director of a division of the Superior Court of the District of Columbia that runs a number of different dispute resolution programs and it is known as the multi-door dispute resolution division. I will talk to you a little bit about the multi-door courthouse concept, as well.

Prior to that, for five years I ran the counterpart of that program in Houston, Texas, which was known as the Dispute Resolution Centers, and I will be talking to a great degree about those programs today throughout the presentation.

I was just recently in a training session with my staff to talk about giving presentations and training, and the number one rule was, do not put too much information into a presentation. I can tell you, I have really not followed that rule in this particular session. I know you have heard a lot of testimony thus far. Please tell me if I am being repetitive of something you have already heard. Please feel free if you would like to stop and ask questions as I go along as well.

I come to you today very much as an administrator of dispute resolution programs that have been designed to serve the court and the community. I come to you as an advocate of dispute resolution, I will tell you that up front, that is based on over six years of experience of seeing at first hand the benefit to the court and its litigants as well as to the community as a whole.

As I discuss what I consider to be really unlimited possibilities towards the use of dispute resolution, I also want to outline issues which will require your serious consideration today and

over the next several days as you learn about this growing field.

The phenomenon of dispute resolution has been referred to by a number of terms throughout the years. Alternative dispute resolution is one, ADR. The dilemma then came, is the use of mediation and arbitration an alternative to adjudication, or is adjudication one of the alternatives? Some jurisdictions then turned to complementary dispute resolution, supplemental dispute resolution, innovative dispute resolution and so forth. So most of ours have just cut it and termed it as dispute resolution, period.

These terms basically refer to a variety of forms or processes in which individuals are able to consider the resolution or settlement of their dispute. I am sure you have heard these terms thrown around earlier today. These forms include, but are not limited to, conciliation, mediation, case evaluation, summary jury trials, mini-trials, bar panels, arbitration, and I am one who considers adjudication as one of the alternatives.

I am sure they have been defined throughout the day, but if not, then on this little pink sheet of your first handout here there is a definition sheet that covers what are considered to be the main processes.

These forums may be accessed voluntarily at the request of the parties, or the court may mandate participation by parties in these processes. Parties may participate in mediation, arbitration and so forth prior to or after the filing of a formal complaint in the court system. Decisions reached may be binding or they may be nonbinding on the parties. These forums may be appropriately used for a whole wide variety of disputes.

The next page kind of lists a litany of types of disputes, but what I will be referring to most often are civil litigation from small claims matters to multi-million dollar types of disputes; criminal types of disputes, both in terms of the resolution between disputing parties and also in terms of restitution; community disputes between neighbours, family and friends; problems between consumers and merchants, landlords and tenants; divorce-related issues of child custody and support, property division and spousal support, as well as conflict in elementary, middle and high schools where youths mediate youth disputes.

The use of ADR in resolving these kinds of disputes, I think, is best exemplified through a discussion of the multi-door courthouse. Harvard Law School Professor Frank Sander conceptual-

ized a justice system that coordinated various dispute resolution forums in addition to adjudication and provided assistance to citizens in determining the best possible forum available to them to resolve their disputes.

This concept was known as the multi-door courthouse. It was originally implemented as a pilot project in three jurisdictions almost six years ago. Two jurisdictions have institutionalized the program today, and Houston, Texas and Washington, DC now assist over 10,000 citizens each to resolve disputes without the necessity of a formal court trial.

I had the pleasure to direct both of these programs. I served as founding director of the program in Houston and now administer the multi-door division in the District of Columbia.

Beginning in 1984, the pilot projects were implemented in two phases, and this effort was spearheaded by the American Bar Association standing committee on dispute resolution.

The first phase focused on the development of an intake and referral component to assist citizens in the analysis of their dispute and its resolution. Intake specialists knowledgeable about the traditional criminal and civil justice system, programs and processes such as mediation and arbitration and social service programs in the community were able to link citizens to these dispute resolution services. The second phase focused on the development of additional doors or programs through which disputes could be resolved.

Today, the multi-door program services two very different models for your consideration. I would like to talk with you about the differences and the similarities briefly before I go into the specific programs that are administered.

In the District of Columbia, the multi-door program is court-based. It is sponsored and funded by the court system. It services primarily the court. It does handle disputes prior to filing a formal complaint in the court system; however, the majority of its cases are handled after the citizens are actually involved in the court system. The case load is primarily civil or domestic relations oriented, except for disputes that may be seen through the intake component of the program. It is a centralized operation. All of its programs are administered in the central courthouse facility.

The Houston program, on the other hand, is an independent nonprofit organization that was sponsored by the Houston Bar Association. It was funded by state legislation that provided local option for a filing fee on civil cases that

went through the traditional court system. The local county could opt for funding to be imposed, as well as the amount of the funding and the way in which the programs were administered. It grew from a community-based mediation program that primarily handled only disputes prior to any court intervention. It was high volume and had a high-volume number of cases prior to any court action. It serviced the courts, city and county and state entities, and community agencies. It was decentralized. Its services were provided out of a number of facilities around the city. Its case load, on the other hand, was about 50 per cent criminal-type disputes and 50 per cent civil-type disputes.

The similarities of the two programs, and what are often similar in a number of dispute resolution-type programs are, they relied heavily on the use of volunteers as neutrals and believed very strongly in the training and monitoring of those volunteers; they were institutionalized and enjoyed stable funding; both programs coordinated a number of various programs that dealt with a wide variety of disputes; both programs enjoyed a very strong support from the courts, the bar and the community as a whole; both filled in service gaps in their respective jurisdictions and improved public perception of the justice system, as was exemplified by very high satisfaction rates of attorneys and parties who participated in the programs. All of the services were provided to citizens at no charge.

What I would like to do before discussing the actual program is give you somewhat of an orientation of the court system so that you can relate this to your own court system.

In Washington, DC, the Superior Court runs the small claims court, in which civil disputes under \$2,000 are handled. It is considered the state court or of general jurisdiction for civil, criminal, family and probate matters.

In Houston, Texas, the small claims court—there were 16, as opposed to one small claims court held around—the jurisdiction was \$2,500. There was a municipal court which handled juvenile misdemeanour matters. The district court, the court of general jurisdiction, handled civil matters of \$2,500 and above, and criminal, family and juvenile matters.

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There is also a Court of Appeals here. However, as it relates to dispute resolution, we do not work with them. In Houston, we did work with the Court of Appeals. The chief justice of the Court of Appeals was Judge Frank Evans, whom you heard Mr Tannis talk about earlier,

who, when I first starting working in Houston, was considered the father of dispute resolution. By the time I left they were calling him the grandfather of dispute resolution. The court is very much an advocate.

What I would like to do is talk with you a little bit about the objectives of the multi-door courthouse and, as I talk with you about the objectives, talk about specific programs that were designed to meet those objectives. The objectives are also listed in your handout on the green sheet. One of the primary objectives was to increase coordination among resolution entities so that they could receive appropriate cases so that citizens could locate and access services.

What this chart shows is that in Frank Sander's original concept, all citizens' disputes would go through the multi-door courthouse or component, the intake and screening process and then would be directed to mediation or arbitration programs, litigation, criminal prosecution or social service organizations. Unfortunately, when we went into Houston and Washington, we were not able to rip down the existing system, so we had to integrate ourselves into the system.

This is more what it looks like today. Citizens with disputes may come directly to the multi-door intake centre. They may go to a social service organization that would refer them to the multi-door. They may go through criminal prosecution, end up in an ADR process or be referred back to the multi-door intake centre.

It is the same with civil litigation. After they have gone through the multi-door process, they may be given information. The dispute may actually be conciliated at that point by the intake workers. They may be referred to mediation or arbitration programs. They may be referred to civil litigation, criminal prosecution or social service organizations.

One of the best components of this program was that citizens are very frustrated when they try to access the justice system, at least in the United States. There was a comment earlier: "They don't know what to expect. They don't know where to go. They are frightened," and so forth and so on. This was true, very much so, as it related to Houston. There were a number of prosecuting entities you could go to to file a criminal complaint. You could go to the county district attorney's office, the city prosecutor's office, the police department, or the justice of the peace court, and your chances of being at the right place at the right time were pretty minimal. You also found very often that citizens were at the door of a criminal prosecuting entity wanting

money back for their broken window and obviously were not going to get that through the criminal prosecution.

The multi-door system in Houston had intake specialists who were located in all these different facilities as well as in social service facilities so that they assisted citizens in getting to the right place they needed to be. If a citizen showed up at the city prosecutor's office and really needed to be at the district attorney's office, that intake specialist would contact that other organization and really set it up for the citizen before he was even directed over there. It helped quite a bit in reducing the amount of citizen frustration that was experienced.

Through the intake interview, the intake specialist talks with that citizen about a number of things. He talks about financial or other eligibility requirements of the organization, the availability of services—if someone needs services immediately but there is a waiting list of four months, that is an inappropriate referral and that citizen should not be sent there—the likelihood of sanctions or financial compensation, the necessity of evidence or witnesses and so forth.

They also talk with them about the history and dynamics of the conflict, whether they had evidence that was available, their financial status, support systems, willingness to participate in a resolution of their dispute and a number of different topics and, together, map out the steps that the citizen needs to take to resolve that dispute. Step one may be to go to a mediation service. If that does not work, then step two may be to go to file a complaint, the criminal prosecuting entity and so forth and so on.

The second objective was to provide cost savings to citizens. I know this is an overwhelming poster. I will try to make it clear to you. As I said before, all the services of the multi-door programs are provided to citizens at no charge. One of the instances I can exemplify as far as cost savings is concerned is the Houston community-based program. Every year about 3,000 mediation sessions are scheduled for citizens who have disputes; this is prior to any kind of court intervention. Of those, about 1,200 actual mediation sessions were conducted. It is a voluntary process and oftentimes people will not agree to participate in the process. Of those who did agree, 62 per cent were able to resolve the dispute without going any further, without costing any money and actually having a hearing set within a week of their coming into the intake centre.

In small claims they have trial programs, which are also available in Washington, DC, as well as Houston, Texas. In Washington, DC, the small claims court is considered the court you can get in and out of fairly quickly. However, that is not always true. You may actually have to come back two, possibly three times. About eight mediators are available in the court every day. Citizens sit down with the mediator and work towards a resolution of their dispute. In those situations about 2,000 hearings were held and about 46 of those actually reached a resolution.

You will see two figures here and I think they are both important. This first figure of 2,000 is the number of cases where people entered mediation or were referred to mediation. The 1,500 figure are those who actually completed mediation and completed the process. Of those who actually completed mediation, actually 78 per cent were able to reach a resolution. The court then reviews that agreement, stamps it and the parties are on their way, so they can, theoretically, if they are able to resolve the dispute, get in and out in the same day.

That is not always true. If the mediation program is not there or if the parties are not able to resolve their dispute, they may realistically have to come back at least twice, sometimes even three times. For a \$2,500 dispute, when you are taking time off from work and hiring babysitters and so forth and so on, it becomes quite an expensive proposition.

The next objective was to provide a system of justice that is responsive to the needs of the public. That does not necessarily mean that the system does not strive to be responsive to the needs of the public and would not be without dispute resolution. I feel strongly that dispute resolution techniques complement the justice system. I do not believe it is a replacement or a supplement for it. I think that when you design programs and you have concerns and they interface with the justice system, you can design mechanisms to ensure checks and balances.

The justice system, at least in these two jurisdictions, felt that it wanted opportunities for citizens to resolve their disputes faster and simpler if they chose to do that, that they were able to work with flexible agreements with a greater compliance rate and that they had an opportunity to go through a process that may be a little bit better at keeping relationships intact. As an example of this I would like to refer to the domestic relations program.

The domestic relations program has a number of ways in which you can access the program.

You can go in to receive domestic relations mediation either prior to any formal court action, or you may be referred by the court and be required to go through the process, or you may, once you already are in court, choose to access mediation at that point. All types of issues are mediated in the domestic relations program. If it is referred from the court the judge may say, "I only want you to deal with the issues of child support," or he may say: "I can only deal with the issue of child support. I'd like you to deal with all the other issues." So you can be flexible with the way in which you administer dispute resolution programs.

I was talking earlier to Mr Jackson and he talked about the child being used as a pawn between parents who are getting a divorce, and I think that is true. What mediators do, as do judges, is to attempt to make sure that the parties realize that they need to focus on the future parenting of this child. They are both responsible for that and the best interest of the child is of priority concern.

The court wanted to make sure that occurred. So they review domestic relations agreements to ensure that if there is something there they do not feel is right, they can then inquire about it and make a decision and their judgement would override any mediated agreement that might come out. It is rare to never that a judge actually changes a mediated agreement. He may fine-tune some points, may add something to it, but it is very rare that he actually tosses the agreement out and starts from scratch.

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The parties, however, feel as though they have had a part, as participating. If they work until five, oftentimes the judge will say, "You need to pick your child up at five," but if that person works until five that is not a system that is going to work in their day-to-day lives. In mediation you are able to work out those kinds of agreements.

The next objective was to make available various forms or doors through which disputes may be resolved, thereby increasing access to justice and providing additional tools to judges, lawyers and litigants. The moderated settlement conference in Houston was established simply because of that. Lawyers came to the dispute resolution program and they said at that time we really did not have programs that interfaced to a great degree with the district courts. They said, "As lawyers, we want additional tools in order to assist us." For some reason there is a—I have heard it referred to as a wimpism, that lawyers

sometimes do not want to be the first to come to the table and say, "Let's talk settlement," but they wanted a process that brought them to the table so that they could still save face.

The moderated settlement conference was developed with those specific situations in mind. The bar association in Houston did not want a mediation process because they wanted that neutral to evaluate the case. In mediation, oftentimes that is considered not appropriate for somebody to say, "In my opinion your case is worth X dollars." But in a case evaluation process that is the objective and that is appropriate. So the moderated settlement conference is basically where a panel of three lawyers—two who specialize in the area of law of the case, the third who does not—will sit down and hear brief presentations by the parties, will deliberate, ask questions, deliberate, then come back with what should be, but is not always a unified decision about the value of the case.

Through that process they were able to have an evaluation. Oftentimes lawyers will tell their client the case is worth X dollars, but only when they hear a panel of three lawyers say it is worth X dollars do they actually believe it and it is used as a reality testing. They were given a settlement opportunity while they were still able to save face, and overwhelmingly lawyers said that even if they were not able to settle their case, they were far better prepared to go to trial because the issues were more clearly identified, having gone through that process.

You can expand this objective to also provide additional tools for the justice system as a whole, which was true in the juvenile mediation program that was established in Houston, Texas. The juvenile mediation program was established primarily out of a need in the system. First-time offenders, which were called counselled-and-closed cases, went through the probation department, were talked to by their probation officer, were basically told, "Don't do it again," and their file was closed and they went on.

There was a strong feeling in the system that these kids were coming back through because nothing happened to them at all the first time, so there was a real need to set up a system, to set up an opportunity for the youth to have an understanding of what occurred. The juvenile mediation program received referrals from the juvenile probation department, from the municipal courts which handled the juvenile misdemeanour matters, and from the juvenile district courts as well.

What would occur is that it was a voluntary process. The juveniles had to agree, the other party—some people call it “victim”—had to agree to participate in this process. They sat down with the help of the mediator and they discussed what occurred. Sometimes, not all the time, restitution-type agreements would come out, anywhere ranging from an apology to, “I will pay for the window.” What occurred is that the juvenile realized that there was a person who was attached to that window, that there was a ramification for what occurred.

What was also interesting was that the victim realized something. Their fears were reduced. They realized that the juvenile did not stay up all night thinking about how he was going to get the people who lived on the corner, that it just happened to be the first house he was crossing when he had the brilliant idea to do whatever it was he did. So there was a real benefit all the way around the table and there was a feeling that it did in fact reduce recidivism. However, it was fairly early established by the time I left the program and to my knowledge there has not been any real research on recidivism rates as a result of that program, but there was a strong feeling among the staff of the probation department that this in fact occurred.

The next objective was to save judicial resources for those cases that cannot be resolved another way. I think that is true in all the programs, but there is one program that I would like to discuss with you to exemplify that. In Washington, DC—you will see it under civil mediation—the court is now in the process of going through a civil delay reduction project. What they are trying to do is change the calendaring system from one of a master calendar system, where when a case is filed in the court one judge may hear a motion, another judge may hear a pre-trial and another judge may ultimately actually try the case, to one of an individual calendar system where the moment the case is filed it is assigned to a specific judge.

As a part of this effort they assign two developmental individual judges. They assigned 800 cases to these judges, 400 cases each. As part of that, over an 18-day period the multi-door division mediated those cases. The parties were ordered to participate in mediation. After that 18 days a single judge had his calendar reduced from 400 cases to about 180 cases. So over half—55 per cent—of the cases were removed, which I can tell you thrilled the judges to no end, and they felt that in fact the program did save them time and effort.

They also have a program the court calls its most complex civil litigation, civil I. These are cases that require probably a week at a minimum of trial time. Oftentimes those cases are referred to mediation and in over 50 per cent of those cases the cases are resolved. I do not want to lead you to believe that this happens by a lawyer sitting down and mediating the case for an hour. These volunteers put in anywhere from 16 to 25 hours of time in mediating these cases over a period of several weeks. It is labour-intensive on the part of the mediator, but it does however save judicial time.

The final objective was to increase citizen awareness about dispute resolution forums. I would like to talk to you a little bit about what I also agree is one of the most innovative uses of dispute resolution, conflict management. I think one of the most exciting things as an administrator is to know that 10 years down the line I will not have to beat my head against the wall talking to lawyers and kids and trying to get them to understand dispute resolution processes. They will understand concepts like mediation from a very young age and will have had an opportunity to see how mediation works in their school justice system. To go into a school and train youth to mediate youth disputes is a very exciting thing, to see the way the kids respond, to see how excellent their skills are and to see how they carry that over and take it home with them and teach their families about it.

We work extensively with law schools. In Texas we had what was called a dispute resolution week—I think they are on their fifth one now—where there are about 100 events throughout the state that highlighted dispute resolution programs and services. Texas relied to a great degree on more of a voluntary system, which I will talk about in just a moment. As a result of that, you really need to intensify your education efforts. We did a lot of things. We had nice flashy pink brochures that lawyers saw a thousand times at every conference they went to. We developed a handbook on alternative dispute resolution. The bar association dedicated an entire bar journal to dispute resolution. All of these are sponsored and paid for by the bar association in an attempt to educate and orient lawyers to the use of these different processes.

As policymakers, I am sure you are concerned about issues that you need to think about and think through when you are considering implementing or recommending that dispute resolution programs be implemented. I think there are a number of issues. These are not all of them, but I

would consider these to probably be the most important.

One is the goals of the program. Is your goal to relieve backlog? Is that truly a goal? If it is, I think you need to be honest about that and design programs that will attempt to meet that goal. Is it to address a specific case type or its impact on the system, for example, the juvenile mediation program that I talked with you about earlier? Is it to provide an alternative to the adversarial system so people have choices? Is it to serve the court primarily and therefore address court concerns? Is it to address community concerns and be outside the purview of the court, or both?

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Program authorization and its control and evaluation: do you intend to set up programs by local rule that are governed by the court? We have in Washington, DC, a mandatory nonbinding arbitration program, which means you have to go into it, but if you do not like what the arbitration award is, you can request a trial *de novo* and get back on the trial calendar. That is set by court rule in the rules of civil procedure and is governed by the court as such.

Do you intend to set up authorization by way of legislation with oversight by the government as the funding system was established in Texas, or do you intend to encourage independent programs to be linked to the formal court system by some type of an agreement in working referral systems?

Funding, which I am sure is very much a concern. These are all great ideas—as I said, I am an advocate—but they cost money. Is that funding going to be by private means in fund-raising and foundation efforts or will it be governmental funding? Will it be user-financed? If I want to come in and talk with an intake specialist or conduct a mediation, will you ask me to pay X amount of dollars or will it be funded by a filing fee on litigated cases, as the Texas system is set up?

Administrative support: where are they going to be located, inside the courthouse, outside the courthouse? Will it be a centralized process or a decentralized process? Again, Washington is all administered under the central courthouse facility. Houston, Texas, offers services at seven full-time and seven part-time locations, which also include community service organizations. Anywhere people typically went with their disputes, we tried to put a program there. The size of the paid indoor volunteer staff is important to consider.

The scope of the program. the types of cases and the number of cases you want to handle: do you want to limit access prior to intervention by the court or limit it to only intervention after the court has been involved, or both?

Management of neutrals, which I think is probably one of the biggest issues in the field of dispute resolution: how are you going to select your volunteer neutrals? How are you going to train them? How are you going to monitor them? How are you going to evaluate their performance? How are you going to pay them, if at all? In both the Houston and the DC programs the systems are very similar.

Selection process: people fill out applications. They send them in to us. They may or may not be asked for an interview. They are interviewed. They may or may not be asked to go through the training. They are trained. They may or may not be asked to continue with the program after their training. People sit in with them. There are user surveys of participants who are in their session, and at all times they are very much aware that they may be asked to discontinue their volunteer service with the program as a result of inappropriate behaviour.

They are paid a stipend. Arbitrators in Washington, DC, are paid \$200 per case. Much to my dismay, but because of limited funds in that area, mediators are not paid the same amount of money. They are paid about \$25 per case. Small claims mediators are paid \$25 per day and they mediate three to four cases. So there is some discrepancy. There were available funds to pay arbitrators but unfortunately that did not go to mediation. Some feel that arbitration is more difficult because parties are rendering their decision. In my personal opinion, mediation is much more difficult. To walk that fine line takes a lot more effort—to assist parties in negotiating, to assist parties in generating your own option—than to render a decision, but again that is a personal preference.

Referral systems are another implementation issue. How are cases going to enter a dispute resolution? Is it going to be mandatory or is it going to be a voluntary option to get into the programs? This again is a big philosophical debate in the field of dispute resolution, whether participation in mediation or arbitration should be mandatory. Many jurisdictions believe that it is the court's responsibility to provide as many opportunities for litigants to consider the settlement of their dispute. The court mandates participation by lawyers and litigants at scheduling conferences, at pre-trial conferences, at

judicial settlement conferences and so forth, and therefore participation in mediation or arbitration is viewed as a similar event.

I have worked for jurisdictions that believe in mandatory systems, and Houston believes more strongly in a voluntary system, so I guess I can see the benefits and downfalls of both first hand.

Mandatory systems most often have some common factors. One is that they may mandate participation in the process, but it is typically with a nonbinding or advisory decision of that process; so they are not required to do anything once it comes out, even if a decision is rendered as in mandatory nonbinding arbitration. The decision is, in fact, nonbinding. The case is not prejudiced and it does not lose its position in a court docket. I think if you are running a court-based program, the last thing you want is for participation in dispute resolution to impede, or to take longer, that case going through the system.

Typically, a court order is issued so that noncompliance can, in fact, be monitored and sanctioned. There are typically systems for voluntarily opting into the program, as well as opting out after the referral is made. Again, I think that is important. If you are going to have a mandatory system, then I think you need to give people an opportunity, with legitimate reason to say, for whatever reason, "I do not want to go through this process." Referral systems may be random, which is also often implemented in experimental programs. It may be by case type—all contract cases go to arbitration—or it may be by monetary value—all cases under \$50,000 need to be mediated prior to going on—or it can be on an individual case analysis by the court or by the parties.

I think the results of the mandatory systems are higher case load and a greater impact on the court. I think there is also a greater understanding by the public and by lawyers about what dispute resolution is, about what these processes are attempting to do. It is kind of the "try it, you'll like it" phenomenon or "try it, you won't like it." But, by first hand, they have learned about the objectives of the program.

Voluntary systems: the Texas statute, which Ernie referred to earlier, is also in your materials. It is about half-way through on the buff-coloured piece of paper. It is the 1987 Texas Alternative Dispute Resolution Procedures Act, which is quite a mouthful. It attempts really, in my opinion, to walk the fine line between voluntary and mandatory systems. It sets out that it is the responsibility of the court to encourage participa-

tion but also allows for the ability to provide written objections to the referral. Having worked with judges for a number of years, I think it is each individual judge's view as to what the term "encouragement" means, and so I think that if you set up a statute like this, you need to have a mutual understanding of what is encouragement and what is not encouragement when it comes from the bench.

Voluntary systems, typically, are slower to develop case load and therefore have less of an impact, at least initially, on the court. Voluntary systems require a tremendous effort towards lawyer and public education regarding the use of dispute resolution, and that is why I kind of point to some of these publications and videos and speaking events in dispute resolution weeks and so forth, that you truly need to get the word out. People do not understand. They confuse mediation with meditation; mediation and arbitration are often used interchangeably and it gets to be pretty confusing when you start throwing out these terms to the general public as well as to lawyers.

Speaking of lawyers, one of the other objectives that Frank Sander had in this multi-door courthouse was to see if, in fact, there was some type of taxonomy of disputes. If you could look at a set of process characteristics and match them with a set of client characteristics, could you always meet that and it would always tell you this case should be arbitrated, litigated, mediated and so forth and so on? I am not so sure that we have learned enough about dispute resolution to actually say, yes, there is very definitely a taxonomy of disputes. Unfortunately, there are such interpersonal and personal factors that go into each situation, different jurisdictions may or may not have mediation or arbitration programs and so forth.

But basically what you are trying to educate lawyers to understand in this taxonomy of disputes are the history and the desire for continued relationship between the parties. Are there power imbalances between the parties? Does the case involve questions of principle or of fact? Does it turn on constitutional issues? Is there a large degree of interparty negotiation that is required? If so, often mediation assists in that type of negotiation. Is compromise inevitable in this situation? Will the cost of litigation exceed the value of the case? Is there a need for publicity or privacy in this particular matter? You see, we spend a lot of time talking with lawyers to look at their cases, as well as parties, and try to determine whether they think that dispute resolu-

tion will, in fact, assist in the resolution of their case.

I guess I personally believe that the taxonomy of disputes really leans more towards experimentation, education and knowledge of individuals in the community, the availability of the programs, the established referral systems that exist or do not exist in that community, as well as promotion and encouragement, so I truly do think we are still learning a lot more about the taxonomy of disputes.

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Now I would like to turn a little bit to some common concerns that you hear about dispute resolution. One is an issue of coercion, and I talked a little bit about the mandatory and the voluntary participation. There is a concern that if there is a power imbalance between the parties, the outcome will not be a legitimate and fair outcome. Oftentimes our mediators and our civil mediation programs are quite concerned, when they are mediating, with one represented party and one pro se party. They feel that they are put in a difficult position. How does that pro se party look towards them for legal advice, and so forth?

Again, I think that this is an issue of monitoring how your mediators perform. I also feel that if you have concerns about a pro se party going through a mediation process, you should have those same concerns about that pro se party going through the traditional justice system and how he fares in that process as well.

Another concern is the one of second-class justice, that those who cannot afford litigation will be forced to opt for, say, a community-based mediation program. I think that this would be the same concern and the same problem before dispute resolution programs were available in the community, but in my experience with programs around the country, they take a great degree of care in attempting to talk with parties, to get them to entities that can provide them with legal assistance, to encourage them to have lawyers review their agreements in certain instances and so forth.

Conversely, there is a concern that there will be a desertion of the courts by the wealthy, that those who can go out and hire private judging will do so and the courts will be left for those who cannot afford that. I would not see a mass exodus from the courts if people were using arbitration, which is similar to private judging, and I do believe that there will be entities that will go out and get their justice faster, so to speak, because they could afford to pay a judge. But I do not see that there will be a mass desertion of the courts.

The next concern is the qualifications of neutrals, the standards and practice of ethics of those neutrals. I personally think this is a greater concern of practitioners who provide mediation and arbitration services in a for-profit mode. Programs typically have very stringent monitoring and evaluation techniques built into their program design. They go to great lengths to do that. That stands on the reputation of their program. There are organizations like the Society for Professionals in Dispute Resolution and others which are beginning to develop those types of standards. They mainly are embedded in concepts of neutrality and confidentiality, which most third-party neutrals feel very strongly are necessary components.

Another concern is undermining of case law. Cases, in my opinion, are traditionally settled. Normally they settle at the courthouse doors, but you hear the figures of one to three per cent of cases that go through the system actually reach a trial, so cases in fact are settling. The thought is to provide parties with opportunities to settle their cases earlier if they choose to do so and save themselves some financial and emotional drain.

Another concern is too much access. Will these types of programs bring more systems into the justice system, more cases and complaints? I think you will hear police officers often talk that the third and fourth and fifth time they are called to a home because neighbours are fighting, ultimately there will be a homicide that occurs. Part of the effort of this is to resolve conflict at its earlier stage and therefore try to eliminate, as much as possible, some of that escalation of violence and conflict. There are a large number of cases that are diverted. Citizens who come into the intake centre who normally would have filed a complaint in, say, the justice of the peace, small claims court, may in fact try mediation, may in fact resolve their disputes and therefore will never access the courts. If they cannot get it resolved in that manner, the courts are always there, as they should be.

I will never forget when I was working with the juvenile probation department in Houston to develop the juvenile mediation program, and one of the juvenile probation officers said, "You know, if people out there knew that something could actually be done for them, our phones would be ringing off the wall." I personally was appalled by that, and felt that the system is there to be responsive to community needs, and if disputes are out there, then the system is to be responsive to resolving them. I realize there is a

concern about numbers, but there is also a concern about quality justice in the community.

I will speak for just a few more minutes and then offer an opportunity for questions. The National Institute for Dispute Resolution, which is an organization that deals with policy and principles and funding in the field of dispute resolution, established a task force on policy issues. They came out with seven recommendations or standards or principles that dispute resolution programs should abide by. It must be accessible to disputants; it must protect the rights of disputants; it should be efficient in terms of cost and time; it must be fair and just; it should ensure finality and enforceability of the decision; it must be credible, and it should be expressive of the community's sense of justice. I do believe that in developing programs it is important to keep those principles in mind.

As all advocates, I will close with talking about the benefits of the program, at least what I feel are benefits. I do believe that the public benefits. It has an opportunity for faster and less costly resolution of its disputes, oftentimes keeping relationships intact. There is a high compliance with agreements, particularly in community-based programs where people negotiate their own outcome and so therefore they have invested in that outcome, and there is a higher compliance with that rather than someone saying, "You will do this," or "You will do that."

There is a high satisfaction rate. We believe very strongly in user surveys, and 85 to 95 per cent of the parties that participate in our mediation and arbitration programs were satisfied with the process and thought that it was beneficial, even though they may not in fact have been able to resolve their dispute through the process.

Parties are directly involved in the resolution of their dispute. This is, in a way, another factor that lawyers like. Lawyers often hear: "You're not working for me. I don't see you negotiating on my behalf." In these sessions, parties are present. It relies heavily on the participation of the parties. They are able to participate and they are able to see at first hand, if they are represented, exactly what their lawyer is doing for them.

Privacy is a situation that oftentimes is important to people. They want their dispute private. It is private between them. The confidentiality of the session is important to them, as well as the flexibility in agreements and being able to mould agreements that are very much conducive to them. I see this most readily in the

small claims court, where typically there are monetary judgements. Parties are excited to be able to develop creative options, of building a cabinet rather than paying them \$50 or whatever it might be. So you are able to be flexible.

Lawyers benefit in being able to evaluate their case, in being able to be better prepared by having assistance in identifying what are the real issues. They have a face-saving settlement opportunity. Multiparty disputes are very appropriate for being handled, as I discussed earlier, with the interparty negotiation. And again, satisfaction.

The courts, to a great degree, are suffering from a poor public perception. I cannot tell you how many times people have walked in to me, in both programs, and said, "You mean the lawyers are paying for you to help me resolve my dispute without hiring a lawyer?" They had a hard time understanding or believing that in fact that was going to happen, or in the court system. I mean: "The court doesn't want me to go through years of litigation? They actually are going to give me an opportunity to sit down and I don't have to pay anything for it?" It has helped dramatically, I think, in public perception.

A case management tool: We find this greatly in our civil programs, and as I said, even if a case may not settle issues of discovery or clarify, the case is put back on track, parties are talking to each other, documents are being exchanged simply as a result of initiating that mediation.

It saves on resources. It saves judicial resources as well as capitalizes on resources in the community. In Washington, DC we have about 300 volunteer mediators and arbitrators who work for the program. Some of them are lawyers, some of them are not. It is a tremendous resource. We could never handle the volume of cases that we do without our volunteers. And again, satisfaction, which obviously I feel is one of the most important factors.

That is basically all I have to present to you formally today, but I would certainly be happy to answer any of your questions.

The Chair: I have a couple of questions. You indicated that the Washington, DC, program, multi-door dispute resolution division, was court-based and the Houston one was not court-based. The Houston one was nonprofit, community-based. You also mentioned that the Houston system dealt with 50 per cent criminal-related. How does the state involve itself or excuse itself from the criminal nature of the process?

1510

Ms Ostermeyer: Again, it could be handled in a number of ways, so let me give you a couple of examples. A citizen may come to the district attorney's office and the case may be somewhat borderline as to whether the county would actually want to accept it to prosecute. They may refer it to mediation, with a period that they monitor afterwards, if the parties are able to reach an agreement. If the parties are able to reach an agreement and they monitor it for X period of time and everything seems to be satisfactory, the case is gone.

The Chair: But to that extent the state is a participant in the mediation.

Ms Ostermeyer: No, they are not. They are not involved in the actual mediation, but there is a relationship between the prosecuting entity and the mediation program in that sense. So there is somewhat of a reporting on the outcome of the session. If they refer the case to us, we would mediate it. We would tell them whether there was an agreement or not an agreement. That would be all they would understand. They may also actually see the agreement, but they would not be privy to any kind of discussions.

The Chair: Who would be the parties to the mediation? The victim and the perpetrator?

Ms Ostermeyer: Correct. The parties that were directly involved in the actual dispute.

To give you another example, a judge may refer a case to us and ask us only to deal with the interpersonal—say it is a neighbourhood type of dispute. They only want us to deal with sitting the parties down and assisting the parties and working out how they are going to live in their neighbourhood together from here on out. So that issue is totally unrelated to what the court might do in regard to its criminal prosecution. But the parties and everyone understands that up front. The parties are then able to sit down and try to figure out how they are going to live together in their neighbourhood from here on out. So the relationship can be different in different instances.

The Chair: How did the bar relate to the multi-door process in the sense that in the minds of a lot of people, when they have something that is legally related, a legal dispute of some type, their first inclination would be to go to see a lawyer and get an opinion from the lawyer, and the lawyer would, in many cases, open fire? In this particular instance, you are attracting them away from the lawyer's office and into the multi-door process, and then you are directing

them to a particular place, which may or may not include lawyers. To what extent did that process create tension between the system and the bar?

Ms Ostermeyer: As I said, I will not sit here and tell you there are not individual lawyers who are very much opposed to dispute resolution because they feel threatened personally or they feel the system is threatened by the use of that. However, in both jurisdictions, the bar was overwhelmingly in support, in terms of lip-service as well as finances.

As I said, all of these publications were underwritten by the state bar of Texas. Lawyers referred cases to us that they did not want to handle, did not feel were appropriate to handle, and so they referred them to us. Lawyers can be involved in these processes. Many, particularly in our civil litigation, very much involved lawyers. So they are not excluded from the process at any point.

There is a working relationship, I think, as time goes on, as dispute resolution is incorporated. In Texas, every single law school teaches dispute resolution, so a lawyer is learning to view his thinking as, "This is a tool for me to use as I have other lawyering tools." I think that it is becoming more and more embraced.

The American Bar Association has taken a tremendous lead in educating, promoting and implementing dispute resolution programs, so I think we have come a way. I think we have a way to go, but I would say the majority of lawyers believe in these processes and believe that in fact they can be beneficial.

The Chair: To what extent did the bar want to have a significant role in setting the qualification of the neutrals?

Ms Ostermeyer: To some degree, I guess when you say that, it kind of depends on—the bar and the court together, I think, work on those qualifications. I think that some dispute resolution professionals who do not necessarily deal with court-based programs have a concern that lawyers or the courts will override the field.

But I will say that the bar association, as well as the court, did want input in setting not only qualifications of neutrals but, for example, in our domestic relations program they had a concern about domestic violence. The domestic bar had a real concern about that and the imbalance of power, so it was very much involved in the development and policy decisions as they related to those programs. The court had the final decision if it was a court-based program, or the program in Houston had the final decision, but

they always welcomed the input and participation by lawyers in that process.

The Chair: What was the motor that was driving the whole process to establish the multi-door dispute resolution division? Was it a reaction to demands by the public or did the leaders in the justice system set it up and people responded to it? What was really the impetus for that being established?

Ms Ostermeyer: I think that in both the American Bar Association was really the initial impetus to go out and look at different jurisdictions and see what jurisdictions might be interested in implementing the multi-door courthouse.

In both jurisdictions there happened to be judicial representatives who were very much involved in the field of dispute resolution and were really the individuals who advocated that those sites become pilot projects. Both jurisdictions had successful dispute resolution programs and community-based mediation programs, so there was already an acceptance, generally, in the community for these processes.

I guess I cannot tell you that it was a clean answer, that they said, "We have problems in our court and therefore we do it," or that there was a response. I think it was a whole number of different issues. But initially there was fairly open acceptance of the concept and the reality that the system could use some improvement, could always look to itself to improve services to the community. They thought this was a way that could be done.

The Chair: Are there any further questions?

Mr Jackson: I indicated some time ago that—

The Chair: I am sorry.

Mr Jackson: I want to thank you for your presentation, for the very good, clear insight into the two systems in two state jurisdictions. I want to get a better handle—although you reference the poor and the potential justice drained by income to the two systems, you did come back though and reference the notion of no costs. I wonder if you could just review that for me very quickly, because you do have a legal aid program in both jurisdictions, I would assume, to the extent that there is less of a cost for those people who do not have the resources in order to have justice. We have the same here, of course. I am trying to get a sense of whether or not there are costs associated with participation in these models. I want to get a better handle on that. I think you gave us some insights, but it is not clear in my mind, anyway.

Ms Ostermeyer: My reference to that was that you can come to either program and go through the intake process, have a mediation session, have an arbitration session. The actual services of the multi-door program do not cost people anything. So if you come to me, you walk in and there is no money involved in that. That was my reference to that.

Mr Jackson: Let me just get a better understanding from that, then. Then you are globally funded by the state through the ministry of what we have called the Attorney General's office. Is that the funding base?

Ms Ostermeyer: There are two separate funding systems for each program. In Texas there is state legislation that says each individual county government can say, "I want a filing fee attached to cases that are filed in the civil system, except for delinquent tax suits." Each county can assess up to \$10 on each case that is filed in the traditional system, and that \$10 needs to go to funding alternative dispute resolution programs.

The county sets up how that system is going to be administered. For example, in Houston it was sponsored by the bar; it was officially responsible for the administration of that money. In San Antonio, Texas, it was an official county department. In another county it was a contractual relationship in an organization. That was the funding base. For the most part many of those institutes could also raise funds in addition to that filing fee money. So that was one funding system.

Here in Washington, DC, the program was initially started, since it was a pilot project, all by grant funds. At some point the court saw the benefit to that and then considered it a part of its standard court budget and it was approved, just as any other court operation or function is approved. I go through budgeting procedures and policies just as any other division in the court would and it is approved in the same way.

1520

Mr Jackson: Recognizing that there is a major difference between the state of Texas and the District of Columbia and how the federal government deals with each jurisdiction in terms of funding—I am aware of that—I wanted to get a sense of how the global budgets work in terms of, is funding applied to the amount of access required or is there a global pot of funds to work with? What is the essential approach in both jurisdictions in terms of the process is allowed to grow and therefore the funds are allocated according to its growth? Does the state see it as a general relief to its standard court system—

although it cannot document its savings, it gets a sense that there are savings there—and therefore can justify this as an increased cost? Could you talk to me about that? I want to get a sense of that.

Ms Ostermeyer: In a sense, again, it is kind of like anyone who goes anywhere for funding. I would have to prove what the program did in the previous year, the number of citizens it assisted, the number of programs that it developed. While I do sometimes have a concern that people look to dispute resolution and only go immediately to the settlement rates and so forth, you did in fact need to quote those settlement rates and so forth and so on.

Then I had to say what happened there and what we spent there and then say: “This is what I intend to do next year. This is the number of citizens we hope to address. These are the problems we have identified in the system or in the community that we would like to address and therefore we need X additional funds in order to do that.” It was a review of past performance, so to speak, as well as setting goals in development. The county or my funding sources would say either yes or no.

Oftentimes, if they say no to something—for example, the court is hesitant to fund videos or books or things like that that I may feel are important, but that it does not feel go to direct client service and therefore are not appropriately funded by the court—I go out and find private funding to do it, so you do trade off in that sense.

In Houston we paid no money in rent because even though we were in seven locations we were provided space by those locations; we were provided telephones; we were provided office furnishings. Again, that was something I could take out of my budget by virtue of receiving that kind of in-kind contribution.

Mr Jackson: My final question has to do with the area of education, an area which is of concern to me. I notice that in your list of services in the open-door concept you talk in three specific areas about education-related services. I wonder whether you could briefly expand on the nature of those with respect to student-teacher conflicts, youth conflicts in the schools—and then you have in brackets “all grades”—and of course the whole area of victims, offenders, and staying in school and not being in school, where the judges would be less likely to put them in an institution when they could be in school, but on a better program. There are those three areas I sense from this and there might even be more, if you can enlighten us. Could you speak to us a bit more about that. It is an area I am very interested in.

Ms Ostermeyer: Let me address your final point, as far as truancy is concerned. In Houston truancy matters went before the justice of the peace court and typically the parents were fined for nonattendance of their kids in school.

Mr Jackson: I love the Americans. What a great system.

Ms Ostermeyer: What we did was to work with the justice of the peace court and we conducted mediation sessions—you will hear them called hearings or sessions or meetings, a number of things—with the parents, with the kids, as well as with the school, typically the principal or the counsellor in that school. The issue was really, why is the child not in school? What is going on in the school or in the home that makes that child not want to go to school?

It was amazing to see what occurred in some of those sessions. Very often it was the school that had promised counselling services, that had promised extracurricular activities, that had promised certain things to make that child more interested in being at school and may or may not have come through with those. There were problems that the parents had in getting the child to school, logistical problems and so forth and so on. The child had an opportunity to speak and to try to let individuals know why he or she was not at school.

The problem was an effort to address the issue. The bottom issue was, why is that child not at school? What can we do to try to make circumstances better so that the child in fact would go to school?

Normally what the court would do would be to hold or waive that monetary sanction on the parents for a period of time. It may in fact ask the parents to come in after X amount of months and review the status of the case and review whether the kid was in school.

Youth conflict in the schools, in the all-grades issue: Again, I think this has been probably one of the neatest things in the field of dispute resolution. Our program went into elementary schools, middle schools and high schools. They taught kids how to mediate kid disputes. In an elementary school there would be conflict managers. They would wear T-shirts or big buttons or something in the school and everyone knew who they were and what they were. If they saw a conflict on the playground, they could run right over there and say: “I am a conflict manager. Can I help?” They would separate the parties and say, “What is the problem from your perception? What can we do to resolve the

situation?" They would shake hands and they would go.

That was very effective in the middle school. In a high school or a middle school that kind of, "I am a conflict manager, can I help?" would not necessarily work. In those instances a certain number of kids were taught mediation skills. Different policies and procedures were set in place by virtue of school administrators and what they wanted. You could see that if there were conflicts maybe referred to them, teachers may say: "There is a problem between Sally and Bill. I think it ought to be mediated."

There could be disciplinary action and it would be referred to the principal, or it could be this: I have seen this particularly in some schools in Chicago where the kids who were bringing guns and knives to school were turned into mediators and would go up to kids who were having a conflict and were ready to get into a physical fight and would say, "I want your agreement that you won't kill each other until noon tomorrow when we can sit down and talk about this." They would say, "All right; fine." At noon tomorrow they would sit down and talk about it.

In some instances, a school official or a teacher may be involved and sit in on the session. Typically what occurs is that at the beginning of the programs they would sit in. As the programs began to operate in the schools, they would back themselves out more and more.

Student-teacher disputes: we saw a fair number of these through the community-based component of the Houston program. Again, it was an instance where there were underlying problems that were playing into more and more conflict between these two individuals. They would sit down and talk about how they were going to work together in the school, what those problems were and what kinds of agreements could be reached to remedy whatever it was that was going on between the parties.

Matters of restitution: we take great pains to balance the power in those situations by having the juvenile go first, by having individual sessions with the juvenile, by starting it out with a really clear perception that this is not, "You did wrong and therefore we're going to talk about how much you're going to pay to resolve it," but, "A situation occurred and we need to talk about it and see whether anything can be done to make the situation better." Oftentimes those types of sessions reached an apology session. It may just be simply an apology by both parties to each other. Oftentimes, with kids who may be razzing people in the neighbourhood, the reason may be

that those people are razzing the kids in subtle ways. So there is an opportunity to talk about the situation from both perspectives.

Mr Jackson: That is wonderful.

Mr McGuinty: I am particularly intrigued by your comments about the schools and my own experience in Dallas and in Chicago. Canadians sometimes like smugly to pride themselves on being bereft of certain conditions that Americans have within their system. I can recall a long time ago, I guess over 20 years ago when I lived in Chicago, when police patrols in some of the high schools were standard fare. Only last week a police chief in my own municipality came to me for advice regarding a request he had from the school board for the police to patrol schools at certain times.

The idea of fining kids for delinquency or truancy I find fascinating. I look back: If my parents had been fined every time I was guilty of truancy, I guess they would have had to mortgage the farm to pay it off.

Mr Jackson: It did not interfere with your education, though, did it?

Mr McGuinty: No, I never let my school interfere with my education.

Mr Villeneuve: Confession is good for the soul.

Mr McGuinty: The sequence of these presentations really is superb. I do not know if it is by design or by accident.

Mr Jackson: Doug will take credit for it.

1530

Mr McGuinty: Typically, all us politicians take credit to give the illusion of being responsible for things that we have no control over. But yesterday and this morning we had two wonderful presentations from Mr Tannis. He comes from my area; I have to be particularly deferential. His was excellent. In keeping with the very beautiful quotations in this remarkable book, as I told my colleagues—I guess they get tired of hearing it—I am going to impose upon my four criminal lawyer sons the reading of the transcript of these deliberations on this book. If they do not, I will foreclose on their mortgages.

In keeping with the beautiful quotations in this book, I can think of another one. Shakespeare at one point says, "the poet's pen...gives to airy nothing/A local habitation and a name." I am not saying that the presentations we have had prior to yours were airy nothingness, but they were more theoretical. You have brought it down. You have given it a local habitation and a name and have illustrated how it works in the practical order. I

am just intrigued with the way it is working as you have alluded to it in the school system.

After all, we are dealing with an attitude towards law that is endemic. You cannot legislate changes; you cannot change the thinking of practising lawyers. But what really moves me is when people come to me in my constituency office, sometimes poor and sometimes not, but to them the law is an impenetrable bureaucratic monster because it is frightening and intimidating.

I think the procedure and the facilities available that you outline there do a great deal to allay that concern. As Professor McMurtry said yesterday so eloquently, the mark of a civilized society surely is to be reflected in the ease whereby people can avail themselves of due process. That really is the mark of a civilized community.

I have asked everyone the same question and I think every answer I have had has been a little more definitive, a little more clarifying. It is with regard to the qualifications of those who would be involved in the dispute resolution.

I am delighted to learn that a legal degree is not required, because there is not necessarily a correlation between the study of law formally and the ability to arbitrate or mediate. In fact, in my experience, in some 31 years of teaching lawyers, sometimes the reverse relationship might exist.

I would be apprehensive if you have, say, people putting up a shingle saying, "Mediator-arbitrator," or as we see now, "Marriage counsellor." There was a doctor in Ottawa recently prevented from practising medicine further but that does not preclude his setting himself up as a professional counsellor.

What qualifications would be required to earn this horrendous \$25-per-case fee?

Ms Ostermeyer: I want to clarify a couple of things. One is that in the field today people can in fact hang up a shingle that says, "Mediator and arbitrator" and charge services and so forth and so on. Part of our dilemma at this point is to try to educate the community on the questions to ask when you go to that mediator.

Mr McGuinty: There are no regulations? These people are deregulated?

Ms Ostermeyer: There are no regulations, so you can in fact do that. That is a concern. It is something that professionals in the field are grappling with, as to how to safeguard against that. You can be a bad mediator and do damage. I would not want to mislead you. There is an

opportunity for that to happen in the United States today and it does.

The second misconception is that while we do have lawyers and nonlawyers, there are particular qualifications for programs. For example, in our civil mediation and arbitration programs you are in fact required to be a lawyer to serve as a mediator and arbitrator. In our small claims programs and our domestic relations programs you are not required to be a lawyer.

What we look for when we go through the screening process of looking at applications and then having them come in for an interview and evaluating throughout the training session are really, more, qualities. What is your perception of mediation? Do you really want to be an arbitrator if you are going through the mediation program? We ask particular questions that try to allude to that. How open-minded are you going to be with all different types of people? Do you have a real concern about couples who are living together and who are not married? If so, you should not be mediating because you will place a value judgement on that situation which would be inappropriate.

How are you at communicating with parties? We ask a lot of "what if" questions. What if you were in a mediation session and this or this happened? We are looking for responses we feel comfortable with and if we do not get them before the training, we know our problem in training is going to be very difficult in reorienting people to that.

Mr McGuinty: It is not a matter of looking for common sense, but uncommon sense.

Ms Ostermeyer: In a manner of speaking, yes. Throughout the training—this training involves about 30 to 40 hours of classroom-type training—normally these mediators are paired with veteran mediators who have been mediating for a period of time. We have staff who sit in and observe and evaluate with them, and so the training is very much hands-on. We do a lot of role-playing situations so that we can see how you are going to act and react in an actual situation. There are many, many instances where volunteers—while it is difficult, the program does have to say, "I am sorry, but this is why we are going to have to ask you to not continue your participation with the program."

Mr McGuinty: I would mention something that roughly and logically is related in a similar way to what we are talking about. It is a development recently in the Ottawa area. It might have been standard in Dallas or in Toronto, even, for years. It is usually retired or ex-

policemen who set themselves up as consultants of sorts and when people are charged with traffic violations they take them under their wing and advise them. That, I think, is a valid function because, as you know, the ordinary citizen is terribly intimidated and frightened in court. Do you have that type of thing? I am just curious.

Ms Ostermeyer: That has not been administered under my program, not that I am familiar with in this regard.

Mr McGuinty: I really enjoyed your presentation because you did relate, I think, the theoretical aspects we have been dealing with now for a couple of days to the implication and the practical order. I am especially intrigued with your good work in getting at the grass-roots level. An awareness of this, an understanding of this is something that cannot be legislated. It must be developed, to grow, to develop organically over a period of time, which is wonderful.

The Chair: I wonder if perhaps we could add as a further witness Mr McGuinty, towards the end of our proceedings, as an alternative form of alternative dispute resolution, the process of foreclosure, as he suggested, that he would obtain concurrence from his sons by foreclosing on their mortgages.

Mr McGuinty: If they don't read the transcripts of these deliberations, they sure as hell will go out in the street.

The Chair: Ms Ostermeyer, I want to thank you on behalf of the committee members for sharing the Washington and Texas experiences with us. I think they will be very instructive when we prepare our final report. Just one final request: those big badges you referred to that the kids wear in the schoolyards, I wonder if you have an extra one for one of our committee members, Mr Kormos, so he can take it to the other committee that is dealing with the government legislation on automobile insurance. I think it might be very useful.

Mr Kormos: You are quite right. We would straighten it out *toute de suite*.

The Chair: Our next witness is Professor Paul Emond, professor of law at Osgoode Hall Law School who has also done a fair amount of publications. I would ask Professor Emond to come forward, please.

1540

PAUL EMOND

Mr Emond: I am a little at a loss to know exactly how to proceed. I have some remarks that I might make to you. I also have a couple of

things that I might distribute, and I hope this is not a repetition of material that I passed around the last time I was here when we were unable to meet. What is being passed around now are two copies of the Canadian Environmental Mediation Newsletter, which is published by an organization with which I am associated called Conflict Management Resources. This is a group that is based at York University, and more specifically in the faculties of environmental studies and law. We have taken it upon ourselves to promote the concept of environmental mediation in particular and dispute resolution in general. One mechanism for purposes of promoting that was the publication of the newsletter.

I have chosen these two particular numbers of the newsletter because they deal with a couple of problems I would like to speak to. The first problem is one that might be, I suppose, described as facility siting and more specifically how to respond to the so-called NIMBY syndrome—not in my backyard.

Excuse me, may I have, when you are finished, just an extra copy of each? There is something I would like to read to you from that newsletter in the course of my presentation. The second deals with a comment that I wrote entitled "Why Won't the Public Negotiate?" in which I set out some of the problems facing people who are presented with the option of negotiation as a way of resolving a dispute as contrasted with litigation or some form of arbitration, perhaps before an administrative board or tribunal of some sort.

Just by way of introductory comments, I would like to quickly draw the distinction between private disputes and public disputes. I gather the previous witness has been speaking at some length about private disputes and alternative dispute resolution in that setting. In that category I would include, for example, family mediation, family disputes and the growing body of enthusiasm for mediation. Commercial arbitration, I think, falls into this category as well, neighbourhood justice centres; second, the whole labour-construction field; a third and fourth area, insurance, settling through alternative dispute resolution techniques disputes that arise between insurance companies, claimants and so on. That is on the private side. Those are disputes between individuals, or individuals and companies, or between companies.

My interest, and indeed the interest of my colleagues at York University, has been more on the public side. It is in these areas that one might, for example, include such disputes as the

disputes that arise among various interest groups with regard to the regulation-making process. Think, for example, of the environmental sphere as one in which the adoption of regulations that set standards or regulations that establish an appropriate process for purposes of dealing with a particular matter is very much the subject of dispute among a number of stakeholders. It seems to me that there is an alternative or at least there is an option for alternative dispute resolution in that area. Also in the public dispute realm, I would include environmental disputes, resource development disputes and land use planning disputes.

Perhaps fading from the public to the private are comprehensive aboriginal claim disputes involving aboriginal and native people and government. It is interesting to note some of the recent developments that have taken place in northern Ontario involving native people and resource development companies. These disputes, which are often focused or centred on a proposed resource development project, a proposed mine, for example, are now increasingly being resolved through negotiation, often with the assistance of a mediator. My colleague Alan Grant at Osgoode Hall Law School has acted as a mediator in many of these disputes.

This is a very viable alternative, it seems to me, to the prospect of a lengthy, expensive and sometimes inconclusive and almost always uncertain Environmental Assessment Board hearing.

In the public realm, that is, in resource development, land use planning, facility siting, environmental, to name just a few, it seems to me that there is enormous scope for alternative dispute resolution as a mechanism for resolving these disputes. I emphasize what I am sure you have already heard; that is, when I speak in terms of alternatives, I am talking about alternatives to court and I am talking as well about alternatives to administrative tribunals and administrative bodies.

I am assuming now that you have heard a great deal of enthusiasm for the concept of alternative dispute resolution, but one of the problems that stand in the way of a fuller and more expeditious implementation of this idea, if it is so good—I have identified a number. Perhaps I am repeating some ground that has been covered already. I will do it very briefly and if you wish we can delve into this in more detail in the context of questions. It seems to me a first problem, and this may be something that has been a theme of some of Mr McGuinty's questions, is the problem

associated with the professional training of the professional dispute resolvers in this society, namely, the lawyers.

Their orientation has tended to be adversarial in nature. The hired gun may be too simplistic a description for most lawyers, but it is one that many have felt comfortable with. As a hired gun, it is difficult to see the prospects for reaching agreement when, as I say, one's orientation is towards an adjudication of the issue before an impartial body in which the process emphasizes the presentation of a case, and then through cross-examination the discrediting or the pointing of holes identifying weaknesses in the opposing party's case.

It was only two years ago that I asked a friend who was practising environmental law to contribute to the Canadian Environmental Mediation Newsletter a short piece. He wrote a short piece and the piece was very critical of environmental mediation and critical principally because, it seemed to me, he saw environmental mediation as a means of threatening his livelihood, threatening everything that he believed in as a way of resolving disputes. I might emphasize that when one talks about threatening livelihood, one could put it no better than his point; that is, when one has blocked off three to four months for an administrative hearing, the prospect of settling that case moments before the hearing begins is rather discomfoting for those of us who have to pay the rent.

I think we are locked into a structure, locked into a system that has adjudication as very much a part of it, and it is going to be difficult for professional dispute resolvers to wean themselves from the attractiveness of adjudication, to say nothing of the profitability of adjudication. There is a first problem.

A second problem, it seems to me, is the parties. When I say parties I do not mean their professional dispute resolvers, the lawyers; I mean the parties in dispute are reluctant to turn to ADR. They are reluctant to turn to ADR for a number of reasons, but perhaps the principal reason is that when one begins the process of negotiation and ultimately negotiation leads to an agreement, one at the end of the day is required to take responsibility for that agreement. There is no one to blame but yourself if the agreement is not appropriate. It is particularly true among the environmentalists who are often disinclined to agree because to agree is to compromise principles, is to compromise standards.

There is something very attractive about going before an Environmental Assessment Board,

throwing resources at the case and if at the end of the day you are unsuccessful, you are unsuccessful because the board did not appreciate the strength of the case, did not share your sense of value with regard to the things that really matter in this society: the board was ill-informed; the board was unsympathetic to the concerns that your party, your group, has put forward.

All of that disappears once you move into the arena of agreement, because as I have said before agreement presupposes that you have made the best deal you can, that there is no one left to blame but the person who signed the agreement, and that is the party. It seems to me that that is a particular problem which is made a great deal more acute by the fact that many people are not well trained, are not well prepared, are not well financed when it comes to negotiation.

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Negotiation can be extremely expensive in the context of these public disputes, expensive because negotiation is a very creative process. You are trying to find alternative ways of addressing the concerns of the parties. You are not trying to poke holes in an argument, which is sometimes done fairly quickly and fairly easily. Indeed, it is just the opposite. You are trying to create. You are trying to find common ground and that can be time consuming, expensive and difficult. Add to that an unfamiliarity with the process and a lack of training, and it seems to me you have the appropriate mix that discourages parties from participating in ADR.

A third obstacle is that there is little about the legislation in Ontario that does much in the public arena to encourage this kind of dispute resolution. Indeed, beginning with McRuer 20-odd years ago the process was to judicialize virtually every facet of life in Ontario. By judicializing and by defining interest in terms of legal rights, we began down a road that has taken us to Divisional Court on a number of occasions and has seen most of the disputes within society resolved, or not resolved as the case may be, by a whole series of administrative bodies, tribunals and so on.

It seems to me there is some room for a creative Legislature to do much to amend legislation in ways that facilitate and encourage ADR. Again, just to use the environmental sphere as an example, once a matter is on the assessment process track pursuant to the provisions of the Environmental Assessment Act, the Environmental Assessment Board is ultimately charged with the matter if the ministry refers the matter to the board for a hearing or if any member

of the public requests a hearing that is not frivolous and vexatious; that is, the request is not frivolous and vexatious.

The board has said that it is unconcerned about what agreements the parties may reach. The matter must ultimately come before the board for a full hearing and a final determination. Legislation that does not give any encouragement to the parties to reach agreement, any standing to the agreements that are reached, but rather requires one, no matter what is done as a preliminary matter, to nevertheless go before the board and endure a hearing—and sometimes it is enduring, hateful—means there is little incentive to begin negotiation.

Indeed, the negotiation that has taken place in the environmental sphere has taken place largely as a result of fear on the part of one or sometimes both parties about the prospect of going before the Environmental Assessment Board. The process is so expensive, so time consuming and the results so uncertain that any alternative, I think some of these people would argue, is preferable to that. The alternative that they have seized upon is the alternative of trying to reach, by way of negotiation, sometimes with the assistance of a mediator, resource development agreements that will address a whole series of physical, social and economic environmental concerns.

So a third hurdle is legislation that does little to facilitate, little to encourage, and in some respects does just the opposite; it penalizes those who put effort into agreement because the effort is not rewarded when one comes to a hearing. All matters are back on the table. All matters are again open for adjudication.

What is being done to address the problems? I will be brief because perhaps the better part of the presentation is to simply deal with questions that you may have or to engage in discussion with you about ADR. At the law school we are doing something to encourage lawyers to be more sympathetic to the prospect of resolving disputes in ways quite different than the adjudicative setting of the courtroom or the administrative body. I am pleased to tell you that Osgoode Hall Law School, for example, now offers as many seminars in dispute resolution, dispute settlement and negotiation as it does in trial advocacy. I should tell you that this is a dramatic departure from five or six years ago, when we had a number of seminars in trial advocacy and no seminars in negotiation and dispute settlement.

I should also tell you that the orientation of our students has changed. They do not regard themselves by and large as hired guns. They are

looking for more consensual ways of reaching agreement. They see themselves perhaps as healers of conflict rather than advocates of a particular point of view within the context of a conflict. Last year, for example, there were some 120 students who applied to attend the seminar I offered in dispute settlement. So the interest on the part of students, their orientation, their enthusiasm for the approach, is growing, I think, and growing dramatically.

This is being reflected throughout the system. The bar education course has now introduced a good deal of this in the context of its skills training. I think we are increasingly seeing students who are coming through the system with better skills and are more comfortable as negotiators, as persons able to resolve disputes which do not involve going to court.

As far as the parties are concerned, and overcoming the kinds of obstacles that we have described there, it seems to me that it is basically a question of building confidence, it is a question of education, it is a question of training. I think you have heard a good deal on all of that over the course of at least this day's hearing.

As far as the legislation is concerned, I think I might make specific recommendations with regard to the Environmental Assessment Act, for example. The legislation is presently under review and here is an opportunity, particularly in light of the fact that Ontario is a society that is having enormous difficulty siting difficult-to-site facilities.

Perhaps it is no coincidence that we began last Monday on what will, in my estimation, be a two-year hearing at Smithville into the Ontario Waste Management Corp's proposed toxic waste incineration facility at that site. This is a hearing that is beginning after this society has spent some—and I may be wrong in the number, but it is high enough that it will not matter—\$40 million in preparation for the hearing, we will spend another \$40 million going through the hearing, and I do not think any of the parties have any confidence that the result of that process will be particularly satisfactory to anyone.

Indeed, to show you how discouraging the process is, I was advised in confidence by one of the parties, and I will not tell you which one, that the solution is to simply throw more money at the problem until you have ultimately overwhelmed the opposition. It seems to me that is an extraordinary waste of resources.

As I say, it perhaps comes as no coincidence that we are talking about alternative ways of resolving these kinds of disputes, and in particu-

lar disputes that relate to siting facilities, disputes that relate to land use and the broad disputes between environmental protection on the one hand and economic development on the other. I think that there is an opportunity for the Legislature to consider ways that both facilitate and encourage the parties to participate in negotiation, perhaps with the assistance of a mediator, and give status to the results of those negotiations.

As I say, as things presently stand, there is little incentive to negotiate, because all you have done if you have participated in negotiation is to add another step to a process that does not recognize in any real or significant way the results of the negotiation when you come before the hearing. Here is an opportunity for the legislation to facilitate alternative ways of dispute resolution.

As I indicated, I focused, at least for the latter part of my comments, on public disputes as opposed to private disputes. I think it is important that you draw the distinction between the two, because they really are quite different, although I would be delighted to talk on either the private side or the public side.

That is perhaps enough to introduce at least part of the topic, and the questions may take us down any number of roads. I might simply add that this has been an area of interest to me for a number of years, and while my focus has continued to be in the environmental planning, native rights and resource development fields, the courses that I teach cover the full gamut of ADR, if you wish, and I would be happy to answer questions in any of those areas.

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The Chair: I have a couple of questions. I am quite interested in the public dispute issue, particularly because the environment is such a high-profile issue and so important to so many people now. I was interested to see that you extended that to land use issues.

In Ontario we have a fairly new act, the Intervenor Funding Project Act, which I am sure you are familiar with. It enables interested groups to apply to a funding panel to be funded in matters before the Environmental Assessment Board and the Ontario Energy Board. I am particularly interested in it because I presented an amendment, which was approved at the second reading stage, to extend that to major land use matters before the Ontario Municipal Board.

The issue is, on the mediation side of public disputes, how would you suggest dealing with the cost side? There is a lot of mistrust in the

technical reports that are frequently prepared: engineering reports, soil tests, you name it. There seems to be a consensus, at least on the public's side, that there should be funding, there should be financial resources so that they can be on equal footing, if not on an adversarial basis, at least on the negotiating side in terms of information. Do you have any comments on the cost of negotiating how the funding process should work in mediation of major environmental or land use issues?

Mr Emond: It is interesting that the Intervenor Funding Project Act provides funding for participation before these three bodies, and the joint board, of course, as well. Indeed, the intervener funding, while it may perhaps be directed into some aspects of negotiation, is principally focused at funding interveners in their participation before an assessment board, an energy board and a municipal board hearing.

The Chair: Their participation is being funded so they can have expert witnesses and expert reports available as evidence before the tribunal. Presumably that is the same information they should have available in negotiation on mediation.

Mr Jackson: Not necessarily.

Mr Emond: It may very well be the same information, although perhaps not necessarily. I do not know, but let's assume that it is the same information.

What strikes me as interesting is that the impetus for intervener funding has come out of the administrative hearing, the public hearing process, not out of an alternative process that would have brought people together in the context of a stakeholder meeting, for example, or a stakeholder negotiation, and has attempted to resolve these disputes in a less adversarial setting. Indeed, the intervener funding project legislation, I think, was designed to ensure that the public or the public intervener was on an equal footing with the well-funded proponent, the proponent of the energy-from-waste facility or the proponent of a major subdivision, for example. It was to balance up the fight, if you wish, before the hearing body.

I wonder if we might give some thought to expanding the scope of the Intervenor Funding Project Act to provide intervener funding, and indeed provide an incentive to the way in which the funding is allocated, to those who participate in the negotiation that might proceed, or if we might use that funding to pay the costs of the mediator.

It is curious that we heavily subsidize the adjudicative process. We pay the panel members. Indeed, the Environment Assessment Board's budget must be growing at a faster rate than any other board's in the province. It has been astronomical in terms of the way in which it has grown in the last four or five years. So we publicly fund the thing that facilitates and encourages an adjudication of the dispute and we put no resources, or virtually no resources, into the alternative, which would be a negotiation, the hiring of a mediator or the hiring of a group of independent experts who would be responsible to the group as opposed to one side.

Think of the dramatic way in which the process would change if you required the group, as a group of stakeholders with different interests, to reach agreement on a common group of experts, who would take instruction from the group, do their technical or scientific study and then report back to the group. It seems to me that suddenly transforms the character of the process from one in which there are hired guns designed to credit and discredit various points of view to one in which we have a group of people now working together to solve a common group of problems. Since we are all in this business together, trying to deal with our toxic wastes or with a whole variety of issues, it seems to me that we could reorient the way people think about dispute resolution.

To answer your question, it is absolutely essential, it seems to me, that there be some public funding, some public support for ADR in some of the ways I have suggested, because without that—I have talked about a lack of confidence, a lack of training, a lack of ability and the apprehensiveness that people feel sitting down to negotiate with a major petroleum company or a pulp and paper company. Unless you give something that—and I will put this in quotation marks—"arms" the public negotiators, and that something I think has to principally start with money that enables them to hire experts to assist them, perhaps as part of the common group or on their own, then the public will not participate in that process. They will not sit down and negotiate.

The Chair: You would prefer to see the government, if it is going to be funding, to be funding towards negotiation and mediation in the first instance, rather than towards what appears to be unnecessary adjudication.

Mr Emond: Absolutely. I think we might give some thought to ways in which we penalize people for adjudicating. I am prepared to accept

that there are some disputes that cannot be resolved through negotiation; there is no question about that. There will be some disputes that ultimately have to be resolved by somebody who is paid to make tough decisions—let's assume that is the panel of the Environmental Assessment Board or a joint hearing board or whatever—but there is just a whole range of disputes that do not have to go that route.

Indeed, once they go that route, the dispute becomes sharper, positions become more extreme and the prospect of reaching an intelligent, sensible and rational solution becomes more remote. Nobody is encouraged to compromise, nobody is encouraged to participate in the give and take that is characteristic of negotiation, you put your most extreme case forward, you concede nothing and you demand everything—that character. You have been to hearings before and you know what it is like.

Mr Jackson: I could not agree with you more when you deal with the analogy of Don Chant and the Ontario Waste Management Corp. I think in that context, intervenor funding is like enabling one party that did not bring as big a weapon to the table to go out and get bigger artillery so that it can shoot it out more equally. That is a frustration that I sense.

If we can talk about the environmental analogy which you have created and use the OWMC, I think what you are trying to say, at least from where I am sitting as someone who watched all that evolve, is that first the former government created the matrix in which we follow and then the new government for five years has continued along that continuum, but it is not a world of difference. If we had established in the five sites which were originally looked at, if we had begun the process internally with all the stakeholders involved at each of the five sites so that environmental groups were collectively represented in the five sites so that they could participate among themselves in what was the least offensive site to the environment and the Ministry of Transportation could have suggested which was the least offensive site in terms of traffic hazards and so on and each of those parties would have gone through that process then, so that we could have come to a finalized settlement as opposed to now being caught in a worst of all situations, which is that we have eliminated four sites, we are down to one—we have created a Waterloo, if I can go with Ernie Tannis's military analogy. It is not in our nature to have wars, we just keep getting into them. In fact, now we could win or lose that.

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Ultimately, the government is going to have to come in and make the toughest decision, which it was trying to avoid for a decade anyway. In that context, and environmentally, I think there is room for us.

I will give you one more example in terms of achieving more in environment at less cost. Many of us attended an all-party invitation by the pulp and paper industry recently, I think it was in the last two months, and there was a really significant question asked these multinational corporations, many of which have their head office in the United States: Are Canadian/Ontario standards higher for environmental protection or lower than in the United States?

They gave a fascinating answer. They said they are actually higher in the United States because of the processes which we in Ontario drag things through. In the United States they sit down, using dispute resolution mechanisms, and the government clearly states, "Here is what we need to achieve environmentally." They sit down with the industry and the industry works co-operatively. The environmental people are involved, the local politicians are involved, because of the potential for loss of jobs; all those parties are brought in to the table to discuss it. They get a resolution, they get a track and then the government says, "Look, the town"—and I think in the US it is the Department of the Interior—"rendered some certain degree of monitoring and everybody is really happy."

In Canada we do not do that. In Canada we have a conflict-oriented matrix in terms of coming to the conclusion. I mean, we have a tire manufacturer who is in a major fight with the government, and yet the townspeople are worried that there are going to be jobs, environmentalists are worried because in spite of all the arguments there is nobody resolving that. You may want to comment on that, but I thought that was an insight that we got from a group of individuals, based—really, we can do more for less money in this environmental field. I have a follow-up question with respect to your curriculum matters at Osgoode Hall Law School, but could you respond a bit?

Mr Emond: Let me deal first with the pulp and paper industry and then I will expand on your comments about the OWMC.

The Ontario Ministry of the Environment has in fact engaged in a negotiation with regard to the way in which it has regulated major sources of pollution in the province. It is done through something called the control order. The control

order is characteristically something negotiated by the ministry's staff with the person who is the subject of the order. It is a pulp and paper company today, it is a food processing company tomorrow, and so on and so forth. That is negotiation.

The flaw with the negotiation is that the people who must live with the approved pollution, namely, the downstream owners, the downwind owners, the local residents, were never invited to sit at the table and participate in the negotiations.

So rather than judicializing the process, and of course that is the route we are now going, because the environmental appeal board—we now have another board that we have not discussed—is the board that is now resolving a number of disputes that are raised by persons subject to orders who find the orders too this, too that, too something else. I can imagine the consequences if we expanded the right of appeal to the local residents; that one board would be 10 times the size of the Environmental Assessment Board.

The point is, we have resolved these disputes through negotiation, but the negotiation has been biased in favour of the Ministry of the Environment and the polluter. It has excluded from the negotiation process the local residents and provincial or regional environmental groups. As a result, the control order itself has never been legitimate. It has never been something that people have been prepared to accept, there is continual frustration and hostility and so on, and as I say, if the government gets tough enough, that ultimately spills over into an appeal to the Environmental Appeal Board à la the Domtar case.

Mr Jackson: Pardon me for interrupting, but worse than that, what we have noticed is political interference. There is pressure now and then there is, "Well, maybe this wasn't a good deal, even though we agreed to it, because the public is saying we didn't do a good job in terms of negotiating," so then there is a tendency to tamper with it or to revise it and disguise it as a new level of standard which we are now going to impose. That does not do much for confidence or stability in terms of the system. We know examples of that.

Mr Emond: Yes. Just a couple of comments about the OWMC case. I agree with you completely with this caveat, and that is that I would have expanded the approach that you took in two important ways. It occurs to me that the Environmental Assessment Board may very well turn down the OWMC's application because by

the time the solution is in place, the problem has disappeared.

Mr Jackson: Abated.

Mr Emond: Yes. "Disappeared" is too strong. But the solution to the problem, if a sensible person stopped and thought about it carefully for a moment, is not to create toxic wastes from all over the province and transport them to an enormous central facility that is charged with the task of somehow disposing of them in a safe and sensible fashion. The solution, of course, is to change the processes that have created the problem or the solution is to put recovery processes in place so that the thing that was used to manufacture the product can be reused again and you can begin to put in place enclosed systems. There is little that the OWMC has done that has addressed that as a possible solution to the problem, notwithstanding all that Pollution Probe and other environmental groups have said.

Second, I think a sensible person thinking about the OWMC problem would have gone, for example, to the Tricil facility in Sarnia and said: "We're presently disposing of toxic waste here. Imagine what we could do to that facility if we put \$40 million, \$50 million or \$60 million, the money that we have spent to this point in bringing the OWMC matter to Monday's opening hearing, to upgrade and to retrofit and to put all of the proper controls in place at that facility." It seems to me that would have been money reasonably well spent. That option was not considered. It was not considered because the process is designed in such a way that, in this particular case, gave to a proponent the task of finding a site that would include two components on that site; namely, landfill of some sort and incineration of some sort.

With that as its instructions, a whole series of alternative and other options were not carefully examined, options that would have been examined if you had a stakeholder process and you brought to the table Tricil, a company that knows a little bit about the disposing of toxic wastes and has an interest in ensuring that its present facility runs more efficiently, and more profitably for that matter. Of course the same thing would have been true from Pollution Probe in terms of looking at different ways of solving the problem, by changing the process mix and eliminating the problem before it was created.

Mr Jackson: A brief final question: You referenced seminars in terms of ADR. A previous deputant, Ms Ostermeyer, indicated that there was clearly mandatory curriculum in

law school. Are we talking about the same thing or are we talking about something different? Are these makeup seminars, where you can return and take a seminar at Osgoode, or do we have ADR currently in the nonelective curriculum of a two-year law program at Osgoode Hall Law School?

Mr Emond: The law program is three years, only the first year is compulsory and the only exposure one would receive to ADR in the first year is through a civil procedure course which has as its principal focus the judicial process and civil disputes but which would incidentally look at other ways of resolving disputes. Beyond that everything is optional, and so the kinds of courses and seminars that I am describing to you are optional upper-year—that is, second- and third-year—courses. There is no question that we do not have the resources to provide enough seminars to meet the demand and certainly not enough seminars to ensure that everybody—that is, every law student—is exposed to this.

Mr Jackson: I am sorry for interrupting you. I tried to make that my last question, but now I am intrigued with—you can tell us, I sense from your response, that you have a greater demand than you are offering the program in ADR.

Mr Emond: Yes.

Mr Jackson: The chairman likes to use a scale of one to 10. I will let you use whatever scale you want. What is the sort of percentage of access in your opinion? Help us to understand how many students or graduates have access to the ADR. Is it that limited that 10 per cent of graduates have access to it? Is it that accessible that half of all students would get it? Are you measuring that? Could you share with us any specific detail?

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Mr Emond: Yes, we are measuring that. The answer is 20 per cent, just less than 20 per cent.

Mr Jackson: Very good. Are you looking at those areas of specialty to determine that in family law it is considered high on the list of electives whereas in corporate law it is not considered high? Are you monitoring it from the degree of specialty and where these lawyers are going?

Mr Emond: No, we are not monitoring. My sense, and it is just experience, would suggest that approximately 40 per cent of the students who have a particular interest in ADR have an interest that grows out of a concern for family law matters. Indeed, I think that would describe my seminar. About 40 per cent of the students, and

hence the research that they are doing, is in the family law field.

Mr Jackson: In your curriculum, in your—what is it called, the university book?

Mr Emond: Syllabus?

Mr Jackson: The syllabus, thank you. In the syllabus, does the language of the program, the description of the course, indicate that it would lead to a strengthening of family law? I am trying to get a further sense of that. Could you share with us not the whole syllabus, but those elements which speak to ADR in terms of Osgoode?

Mr Emond: We do not try to make correlation between process courses and substantive law courses. We do not say, for example, that if you take these process seminars you will be a better family lawyer or a better environmental lawyer.

Mr Jackson: I understand that, but certainly the language used is that, “We will deal heavily in the areas of X, Y and Z, with strong emphasis on the following cases.”

Mr Emond: Yes.

Mr Jackson: I would imagine your syllabus reads along those kinds of lines and that the professors follow. That is how I understood a syllabus when I was going through university.

Mr Emond: Yes, I think that it very much reflects the interests of the individual who is teaching the course. The courses in this area are being taught at the moment by Professor Fred Zemans and myself.

Mr Jackson: Is he coming before us?

Mr Emond: I do not think so, although I do not know. He is on sabbatical this term. I think he is in Ottawa.

Zemans’s orientation is in poverty law, neighbourhood justice centre, family law field. My orientation is in the environmental, land use, planning areas. People would say, I think, in choosing a course: “If you’re particularly interested in private disputes and more specifically in disputes that properly come within the realm of a neighbourhood justice centre, for example, take it from Zemans. If you want to get a fairly heavy dose of environment planning, resource development, native rights, take it from Emond.” Those I think would be the kinds of decisions that students make. We do not try to do anything more than describe in very general terms what we are offering. So each course would take its own particular bent, depending on the person teaching it and the orientation of the person and of course depending on the students.

Mr McGuinty: Professor Emond, I was delighted and indeed encouraged by your passing remark to the effect that there appears to be some noticeable change in the disposition of students in the last half-dozen years. My concern for this problem in the legal profession—I have not been too hopeful, because I think of it as a kind of inherent difficulty, reacting against the adversarial mentality, which is so typical. I think of it as systemic in a biological sense. It is rooted and it is ingrained and it is reflected in the fruits, in the thinking of the products of law schools.

My experience perhaps predates the last six years, but in my experience—I was an academic from 1950 to 1981, and I have had a lot of law students—very simply in the faculty of arts at that time, if one intended to go into law, one would first of all get hold of the student handbook that had been prepared by the student association, which typed the professors and the courses, knowing full well that admissions committees in law schools, as in medical schools, simplified the task of making judgements by reducing them to a consideration of academic grades. I always felt that rather unfortunate.

I can recall going back to university after the war. Some of my best friends, including partners of Mr McMurtry, never got beyond grade 9, but it was assumed that the foreign travel plan that Mr Mackenzie King had provided was a kind of substitute for formal education. There are doctors, outstanding surgeons, in Ottawa who never got beyond grade 10. That has always disturbed me.

I think it is wonderful that Osgoode Hall is acting positively in this regard, because the undergraduate training that many students get, and I do not think I am being unduly pessimistic, is often little more than an amorphous collection of unrelated courses without a unified principle. My question would be, given the crucial need for a change in the orientation of thinking in law, why would the kind of seminar to which you allude be optional?

I recall having done research years ago, and my specialty was the Christian tradition in western culture, including education. I do not recall the professor's name, but there was a professor at Osgoode Hall who introduced a course in legal ethics. It was an optional course and it was avoided in droves and did not survive. I have seen, literally from Harvard to Colgate to Cornell to Notre Dame, some of the best professors literally eliminated when their courses became optional. So why would that course be optional? That is one question.

Second, to what do you attribute this change of heart on the part of young people? I have not seen it, for example, very, very close to home. I have seen my own children, in a sense, I think, victimized by law schools, trained in the trade without a grasp of underlying principles, fine and decent people doing their job in an honourable way but, I think, severely handicapped and limited. Mr McMurtry made a very, very beautiful comment yesterday. He said, "I didn't learn a hell of a lot in law school, but what I learned I learned from my father." It struck a very responsive chord, because I rather presumptuously try to fill in and make up for the gaps. But I am really delighted at your remark that there seems to be a noticeable change in the disposition of students of law. Do you think this is general? The law school which I am familiar with was set up by my departed friend, Tom Feeney, in Ottawa. That is the school with which I was associated for most of my life up until 1981, until I finally, after 31 years, found a job.

Mr Emond: I do not know what the reason for the change is. I suspect that it relates in part, and perhaps in large part, to the fact that now a majority of students at Osgoode in first year are women, and I think that—

Mr McGuinty: More sensitivity.

Mr Emond: There is more sensitivity. There is a different approach to resolving problems. Indeed, there has been some very interesting research in this field. I was interested to see that that research found its way into Madam Justice Bertha Wilson's speech at Osgoode last week, in which she talked of Carol Gilligan's work at Harvard. Gilligan has written a very stimulating book, titled *In a Different Voice*, in which she talks of the voice in which men and women speak, or at least the suggestion is a voice in which men and women speak, although she does not draw the lines on gender. But clearly I think the suggestion is that that is perhaps at least a partly appropriate way of drawing those lines. So that may be part of the answer.

Mr McGuinty: A bit sexist? No, I do not mean that.

Mr Emond: I do not think it is sexist. It is simply to say that there are different life experiences, there are different perceptions.

Mr McGuinty: Sure.

1630

Mr Emond: There are different ways of looking at problems and thinking about how to solve problems. Those different experiences lead to different suggestions. As I say, it perhaps is no

accident that more than 50 per cent of our first-year class at Osgoode is made up of women, and there is an extraordinary enthusiasm for alternative ways of resolving disputes.

Now, it would be most inappropriate to particularize from the general comment. These are just broad trends. I think that another possible explanation is that we may do our job a little better than we did, although if you do not blame me for all that has gone wrong in the past, I guess it would be unfair for me to take credit for anything that goes right in the future. But it may be that the curriculum has undergone some changes, that as a faculty and as an institution we provide a much broader range of experience to students, expose them to more ideas, challenge them to think about different ways of solving problems and take very little for granted. That may help account for this. I do not know.

Mr McGuinty: Do you plan to follow the precedent of the Ontario College of Art, to suspend all male appointments that come open through attrition or other means until a balance of male and female on staff is met?

Mr Emond: The resolution approved by our faculty council this past fall is that we have established as a very high priority the hiring of women, and it is expressed in those strong terms, but it is not to preclude the hiring of qualified men. But certainly the highest priority is to hire women to our faculty.

Now your other question related to the fact that why is this, if it is so good, optional. I think the only answer I can give you, Mr McGuinty, is that it is a question of resources. We are trying to do more each year with less, or what seems like less, although I suspect that if you are on the spending side, which may be where you are, it seems like more. But it is simply a question of resources. We could offer, I think, eight or 10 seminars in this area. We just do not have the staff to do it.

Mr McGuinty: Generally speaking, professor—and do not answer this if it could be construed as imprudent—is the kind of sympathetic understanding and gut feeling which you have for this issue typical of professors in law schools?

Mr Emond: Of some, yes.

Mr McGuinty: Of some. All right.

Mr Emond: Are you asking for a percentage?

Mr McGuinty: No, I will not. I really appreciate your presentation.

Mrs Fawcett: I really appreciated your presentation and it really hit home, because we have a situation in the riding right now where a

municipality has been turned down at the Environmental Assessment Board and I just wonder if—

Mr Emond: —for a solid waste disposal site. This is north Simcoe.

Mrs Fawcett: And actually there was an extension. There is part of this hard feeling and so on, and I am really interested in this mediation aspect. If we had ADR more, where would this be good? Would it have been good if the ministry had suggested before it even went to the Environmental Assessment Board that this process should have been taking place?

Mr Emond: The example you use is a very interesting one because there was an early attempt to mediate some aspects of the dispute.

Mrs Fawcett: Oh. I did not know how great that—

Mr Emond: Yes, Michelle Picher was retained by the Environmental Assessment Board while under its previous chair, and those mediation attempts were largely unsuccessful. They were unsuccessful for a number of reasons, and we document some of them in the newsletter. I will be happy to send on to you an article about those mediation attempts with regard to the Pauze landfill site and so on.

Mrs Fawcett: I would really appreciate it.

Mr Emond: But one of the problems was that the mediation took place behind closed doors and an apprehensive and concerned public speculated that the worst was happening, as you would expect. So a closed process breeds suspicion, apprehension and distrust, and that was, in part, fatal to the process.

A second aspect of it is that people were new, feeling their way, nobody was well qualified, there was very little experience and a whole series of little mistakes were made. I think that the process left a bad taste in some people's mouths, and allegations were made that people accepted things in the course of the negotiation, mediation, that they should not have accepted, would not have to have accepted had it gone to a hearing. Those people then felt that they had been duped. They had been encouraged to agree by a mediator when in fact it was not in their best interests.

I suspect the previous deputant spent a good deal of time talking about training and how important it is to sensitize mediators to the broad range of skills, beginning with good listening skills and good facilitation skills, that make mediation successful. Without those skills—and I say this without being critical of the previous

mediator in this particular case, because he is a person with many skills—without that training, without that experience, it is a process that can quickly go off the tracks and in fact lay the foundation for an even more bitter, more hostile dispute, as you have now been witness to in the events that followed.

Mrs Fawcett: Correct. Thank you.

Mr Emond: It is perhaps not a full answer to your question, but you raised in your question a very interesting case.

Mrs Fawcett: But one can see that proper mediation, maybe at a crucial time, could certainly eliminate a lot of the things that go on and that we must move maybe—

Mr Emond: Absolutely, yes. The article that I have circulated to you, "Facility Siting: A No-Win Situation?" is prepared by my colleague Professor Audrey Armour from the faculty of environmental studies, and she is a member of the task force that has been charged with the task of siting a low-level radioactive waste facility, and I emphasize low-level. This is not the stuff from Darlington. This is the low-level waste from—

Mrs Fawcett: Port Hope.

Mr Emond: Port Hope. They have set out upon a task of trying to site this facility that is quite different than the Ontario Waste Management Corp approach, and at this point it has been very successful. She documents in these articles, and I really commend them to you, the essence of the process. As I say, at this point, that is, February 1990, it has every prospect of being successful.

Mrs Fawcett: Thank you. I would really appreciate your sending me those other articles.

Mr Emond: Yes, I will be happy to send them to you.

Mr Villeneuve: Sorry, I had to leave, but there is the one implication here that I wonder about. At the mediation process, particularly when environmental people may be involved, are the mediators going to be citing precedents, as they sometimes do in the courts, or are they going to strictly look at merits as they have been presented and forget what happened before?

Mr Emond: You ask a very tough question about the role of the mediator. There is considerable dispute about whether the mediator's task is to facilitate agreement without passing judgement or whether the mediator's task is to facilitate a fair agreement, injecting to

some extent her or his perception of what a fair agreement is.

Indeed, you might make the distinction between a passive mediator who is more in the nature of a facilitator: bring the parties together, convey information from one to the other, take positions back and forth, but pass no judgement on the positions presented and pass no judgement on the agreement reached. That is the passive mediator.

That mediator has been subject to some criticism, and the criticism is that you have an obligation to ensure that the more powerful party does not exploit the less powerful, that the wealthier, better-funded party does not exploit the poorer, underfunded party, and the moment the mediator becomes involved in trying to make value judgements about what is appropriate, the mediator steps on that slippery slope of appearing to be biased in favour of one position or another.

So what I was talking to Mrs Fawcett about, the sensitivity of the mediator, the task of conducting a good and proper mediation, your question highlights just how difficult that is.

1640

You asked me specifically about precedent and the role of precedent. It seems to me that precedent does have a role to play, but the role will be greater or lesser depending on a whole variety of circumstances. As a mediator, if I were mediating a dispute between you and another person, I would want you to know, for example, that a similar dispute was mediated some time ago and led to this agreement. If I did not disclose that to you, if I had that knowledge, you would feel rather badly about the way in which I was conducting the mediation and you would feel as if this were an exercise in which I was assisting the other side exploit your lack of information, your ignorance about that particular fact, so in most circumstances I would want you to be aware of that.

On the other hand, that would not be binding. It seems to me that you may not necessarily regard that precedent as one that would necessarily meet your concerns or the concerns of the person with whom you are negotiating. So while I want you to be aware of it and I want the group to discuss the relevance to this particular case, I do not necessarily want this case to mirror that, unless that is what the parties want and unless it is in their best interests. That is the way in which I think a sensitive mediator would try to use precedent, but it would change, as I say, from case to case. There is no hard and fast rule.

Mr Villeneuve: Certainly in law there are many precedents with almost identical situations. In the area of the environment, it is so vast that we will get very few situations that are identical and I guess the precedent-setting theory will be to a lesser degree influencing—and I guess at the mediation stage it makes it even more difficult even to maybe mention something that is remotely or closely similar.

Mr Emond: Yes. I think if we were, again, engaged in this negotiation and your office had said to you, "Look, here's an agreement that was reached three weeks ago on something comparable, and if it was good enough for them, it's good enough for you," I think your response to that would be: "This is interesting. I'm going to read this agreement carefully, because sensible people have reached this agreement. It may tell me something about what a fair or rational or sensible agreement will look like, but I don't feel bound by it because my situation is different, my needs are different, my constituency is different, my concerns are different, my values are different."

Whether you are bound by it depends very much on whether you are prepared to be bound by it. As a mediator, I will not insist that you accept that. I want you to be aware of it, but I will not insist that you accept it. In fact, it would be improper for me to do that. If I began to negotiate with you to accept it, you would start to think that I was sitting beside the person opposite you at the table and your confidence in me as an impartial person helping you to reach an agreement would start to wane very quickly, I think.

Mr Villeneuve: That may decide one or two of the sides to go on to the next step in the process, if it looks like an impasse has been reached and conclusions are trying to be arrived at in some rather strange way.

Mr Emond: Yes, and if an impasse is reached, it does not necessarily mean we now go to the hearing. For example, I might encourage you and the parties to the negotiation to retain, perhaps with my assistance and under my direction, if you are agreeable, an expert who will report back to the group on ways in which we might overcome this impasse. If you are concerned about water quality, we might together bring in some water quality experts and hear from them. That may be an independent fact-finding way of resolving this impasse.

There are a variety of creative ways of resolving disputes. Indeed, I think it is fair to say that the mediator is less a mediator and more a process facilitator, process designer, trying to

look at creative ways in which we may proceed together to resolve the problem. At the end of the day, we may end up in court, and so be it, but a good mediator will keep you out of court and solve problems in very creative and I think publicly acceptable ways in a way that courts often do not.

Mr McGuinty: To end this very stimulating and informative day and learning experience on a serious note, during the deliberations references were made to two portraits. There is the Holbein portrait of St Thomas More, which I told my colleagues I contributed to my son's boardroom and which people identify, depending upon the religion of the client, as either Martin Luther or St Thomas More, and—this is terrible—the udder portrait referred to by Mr Tannis, which is of two farmers disputing the ownership of a cow. That udder portrait has one farmer holding the horns, one farmer holding the tail and a lawyer in between milking the cow. Do you have that portrait at Osgoode Hall?

Mr Emond: No, we do not.

The Chair: I have one final question. Basically it is to ask you to look into a crystal ball, in a sense. Many hundreds of years ago we had trial by battle, then we moved into a very strict adversarial system of law, the traditional historical common-law system, and more recently we have been seeing refinements of that in terms of procedure and moving into ADR.

How significant is the ADR movement? What is propelling it? Is it a societal dynamic that is propelling it? Where is it going to lead us? Are we looking at something halfway between an evolution and a revolution in terms of how we resolve disputes? In what context would you put the whole area of ADR at this point in Ontario and in Canada?

Mr Emond: I think it is easy for people like myself who are committed to the concept to overestimate the extent to which it is going to sweep across and change the face of the country. I think it is still very much at a preliminary stage.

I think what it needs now to catch on and to be successful is a handful, perhaps 10, of important, difficult, contentious and otherwise very expensive cases to be resolved in this way. Once that happens, I think the momentum for ADR will begin to grow.

One of the things we have noticed to this point is that there has been reluctance on the part of a whole variety of people to engage in ADR, in part for the reasons I have indicated and in part for some others.

As things presently stand, it is a group of people, such as Mr Tannis and myself and many others, who speak about it. The best lawyers in the city practise it on a regular basis, although they probably do not call it ADR, but that is the kind of law they practise. They do not go to court very often. A whole group of organizations, trade organizations and commercial organizations, see it as a very attractive way of reducing expenses and achieving the same or perhaps better results, not just for themselves but for both sides of the dispute. There seems to be, a great deal of interest in ADR on the commercial side. Indeed, it was no accident that the book Mr Tannis referred to this morning, and which I have brought along, is titled *Commercial Dispute Resolution*. That is principally because that seems to be the area that is most likely to experiment with, innovate and employ ADR for purposes of dispute resolution. But I think it needs a push. It needs a little facilitation, it needs a little money, it needs someone to stir up the pot.

The Chair: If it needs a push or somebody to stir up the pot, and you are talking about the 10 or so significant cases that would be required, I guess if I can ask you about a hypothetical situation, if you were the Attorney General of Ontario, how would you do that?

Mr Emond: I think I would be inclined to look at a problem that faces the Attorney General right now; that is, the issue of native self-government and some specific and comprehensive claims. Rather than ending up with the kinds of situations that we see in Temagami and elsewhere, which have become disputes of a sort that could never be mediated because the positions of the parties have so hardened, I would instruct my staff to put in place the necessary people and the necessary structures to use ADR on a case-by-case basis to begin to resolve those kinds of issues, to take one example. I would do the same thing in the environmental field. That would perhaps be an area that I would choose sooner.

I suspect very few people realize that two major mines in northern Ontario, the Dona Lake mine and the Golden Patricia mine, both generated very strong disputes involving the proponent and the local native community that would be adversely affected as a result of the mine. Both disputes were resolved through negotiations, very creative resources development agreements that addressed a whole series of physical environmental problems and social and economic problems. I would want to encourage that kind of thing; I would want to publicize that

kind of thing; I would want to learn from the experience.

To come back to the question that Mrs Fawcett asked, one of the things we have not done is to learn from the rather unhappy experience we engaged in in the north Simcoe case. I think we can put some money into research, we can put some money into doing it in a number of selected cases, and then evaluate the results of having done it.

The Chair: In terms of legislative solutions, do I take it from your previous comments that you would support amendments to the Environmental Assessment Act that would mandate some sort of mediation of disputes or ADR in disputes?

Mr Emond: I am not certain whether I would require that the parties be mandated to engage in ADR or simply recognize the results of ADR so as to avoid the hearing that inevitably follows, even after the parties have reached agreement on a whole variety of issues, but I am certain that I would make some changes to the legislation that would make the legislation a more sympathetic, a more fertile ground for ADR to flourish.

The Chair: At least permissive to the process.

Mr Emond: Permissive to it, and give the process or the results of the process some status. That is the thing that is lacking now.

The Chair: Any further questions?

Mr McGuinty: An observation. As I said, this has been a great, invigorating, stimulating learning experience. The enthusiasm that you, Mr McMurtry, Mr Kelly and Mr Tannis have is contagious. It is an idea whose time has come, from the beautiful quotations in Mr Tannis's book. It is like the old lady who went to the Shakespearean play and said, "He wasn't much of a writer, all he did was get together a bunch of quotations." I think that is a very important aspect of your job.

For example, I was informed today by Mr Tannis of wonderful work being done with the help of my colleagues from the University of Ottawa and Saint Paul University, which I, as a resident of the city of Ottawa and as an academic for a long time, was not even aware of. I think that is a very important aspect of your good work.

Mr Emond: I agree completely. We have to get the word out.

The Chair: Professor Emond, I want to thank you very much for coming to the committee today and sharing your ideas. They will be very instructive to us and I am sure they will be incorporated in some significant way in the

report that we file with the Legislature at the appropriate time.

Mr Emond: Thank you very much for inviting me.

The Chair: We will adjourn until 10 o'clock tomorrow morning.

The committee adjourned at 1652.

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Fenson, Avrum, Research Officer, Legislative Research Service

Witnesses:

From the Canadian Bar Association:

Kelly, John S., Task Force on Alternative Dispute Resolution

From the Canadian Institute for Conflict Resolution:

Tannis, Ernest G., Executive Director

Individual Presentations:

Ostermeyer, Melinda, Director, Multi-Door Dispute Resolution Division,
Superior Court of the District of Columbia

Emond, Paul, Professor, Osgoode Hall Law School



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Hansard

Official Report of Debates

Legislative Assembly of Ontario

Standing Committee on Administration of Justice
Alternative Dispute Resolution



Second Session, 34th Parliament
Wednesday 14 February 1990

Speaker: Honourable Hugh A. Edighoffer
Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday 14 February 1990

The committee met at 1013 in room 228.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: I would like to convene this meeting of the committee. We have as our opening witness today Gordon Henderson, QC, a partner in Gowling, Strathy and Henderson, of Ottawa. He has had many prestigious positions in the legal fraternity over the past number of years and is really one of the leaders of the bar in Canada. I would ask Mr Henderson to go ahead and proceed.

GORDON F. HENDERSON

Mr Henderson: Thank you. I come to you in the capacity of a practising lawyer. I have no constituency in respect of the submission that I am going to make to you. I have had some experience as an arbitrator, as a witness and as counsel, so I have flirted with alternative dispute resolution over many years.

I have, and I think it is before you, a short paper which reflects personal ideals. It is what I would perhaps call mental popcorn relating to the subject. In other words, it is a personal expression of views, having regard to the background that I have just indicated.

I should point out at the start that alternative dispute resolution is not a new concept. Ancient societies had developed arbitration systems long before organized states established judicial systems. Reference to arbitration will be found in the law of justice in the code of Hebrew law. Ancient Athens outlined arbitration as a major mechanism for conflict resolution. England's commercial arbitration can be traced to the practices of trade guilds. In England, the first statute relating to insurance, in 1601, provided for arbitration of disputes, and one could go in terms of the history of arbitration as a dispute resolution mechanism.

It is commonplace to criticize the traditional courts because of the cost and delays inherent in litigation. Alternative dispute resolution provides an option, particularly to assist the court in relieving from those criticisms. Alternative dispute resolution is a mechanism to minimize cost and towards speedy resolution of disputes. It constitutes an efficient alternative, and I want to

stress this, primarily where the parties co-operate—if the parties co-operate, it can be a very effective instrument; there are still some problems that arise because of the nature of the process—or where rules are applicable to the arbitration which provide the arbitrator with the means to control the process so that it cannot be abused by anyone who wishes to abuse it.

Now I going to interpolate that mediation leads to co-operation between the parties. That is the purpose of it. It brings the parties together. But mediation also provides an opportunity to enable public participation in the process. It enables the public to become involved. Arbitration does too, because arbitration is not in the sole control of the legal profession or the judiciary. Both of them enable the public to become associated with dispute resolution.

Arbitrators are not bound by the formalities and procedural constraints of the courts. Sometimes it is more important in the public interest that a decision be reached quickly than that it be technically accurate.

If you will permit me, I will tell you the story of the baseball umpires. Three of them were asked how they call the balls and strikes. One said, "I call them as I see them," the other one said, "I call them as they are," and the third one said, "They ain't anything until I call them." In other words, it is better that the decision be made. It does not matter whether Billy Martin or whoever is going to fight about it; it has to be made. It is more important in the interests of the game to have it done quickly, to have a decision made.

I was involved not too long ago where two different insurance companies insured the same motor car, father and son. Their car was then involved in an accident where there were three claims. It became extremely important which of the two companies was liable under the terms of the policy. If that had gone through the normal courts, there would have been three lawsuits. There would have been a suit between the two insurance companies. But by referring it to final and binding arbitration as to which of the two insurance companies was responsible, the matter got resolved quickly. There was no litigation and the matter went on from there. In that instance, a

quick decision outside the court served the public well.

Through mediation and arbitration, disputes can be conducted on a confidential and informal basis rather than in a confrontational, combative manner. It has been my experience that, as an arbitrator, I can manage the case from start to finish in a shorter time than takes place in a traditional court. Again I stress that where the parties co-operate, sitting times and days are flexible. I have sat on Saturdays. I have sat on Sundays. We have been able to dispose of a matter that would take three weeks in court in less than a third of the time. The convenience of the parties can be more readily and easily met than by the rigid daily schedule of a court. In adversarial litigation, the parties nearly always part as enemies. In arbitration they almost always part as friends.

1020

However, from the standpoint of this committee, it is probably most important that mechanisms for alternative dispute resolution provide a means to relieve against unnecessary burdens from the traditional court system. Our judicial system is overextended. Pressures exist in many urban centres for more judges and more courtrooms. Legal aid has resulted in an increase in litigation and has put further pressure on the scarce resources of the system.

It is also important to recognize that access to our judicial system is available to the poor litigant through legal aid and the wealthy litigant through his own resources. The cost and delays in the traditional system weigh most heavily on the middle class and the small- and medium-sized business. Alternative dispute resolution can be of significant importance for this segment of contemporary society.

My experience has generally been in the field of commercial arbitration, so I am going to stress commercial arbitration in the context of the middle class and the small- and medium-sized business in what I next say.

Arbitration is especially suited and should be considered in commercial arbitration and in those commercial disputes where:

(a) The subject matter of the dispute or the agreement involves trade secrets or proprietary confidential information. Confidentiality dictates a private forum;

(b) Where the parties carry on business in different jurisdictions. Neither party wishes to accept the jurisdiction of the other party. In the absence of a provision in the contract or in the submission under the applicable institutional

rules, the law of the forum will govern procedure. The proper law of the contract will govern its interpretation; and

(c) Where the agreement relates to specialized trade usages. An arbitrator familiar with such uses may save time and expense in respect of expert evidence.

Mediation: Mediation is a mechanism for dispute resolution whereby an independent person may bring the parties together to reach an accepted conclusion of a dispute between them. The third party does not make a binding decision.

I have an example which you have heard about from Mr Tannis yesterday, and that is an experiment in respect of which he was the guiding light and that I think occurred, Mr Chairman, in your constituency. A group headed by Mr Tannis caused a mediation system to be developed at Woodroffe High School in Ottawa. He has probably given you some detail about it and I will just say a word. I understand that you will have heard from Ernest Tannis relating to the project of Woodroffe High School in Ottawa whereby students mediate disputes among students. The project has been so successful that it has now been embraced by the Ottawa Board of Education. The Woodroffe mediation system illustrates the manner in which potential conflicts can be resolved by guided and informed discussion and I commend that type of system to you where it is particularly applicable.

Just to leave that, it is an experience not just in teaching but in civics. These children actually do the deciding. They hear the dispute, they bring the parties together and they resolve the matter. I cannot think of a better illustration of teaching civics to those who are, at that stage of life, impressionable.

I would like to say a word about the Windsor-Essex Mediation Centre. I would also like to leave with Mr Arnott a copy of the History and Pilot Project Evaluation, 1984, of the Windsor-Essex Mediation Centre, in Windsor. I had hoped that it would be done in Ottawa, and I had had an opportunity of speaking to Mayor Dewar at that time about it, but the decision was to try it in Windsor. It was a happy decision, because it was, in my view, a very successful project. I will leave this you so that you can see the manner in which an experiment in Windsor successfully took small claims court out of the court, took types of criminal activity out of the court, and had them dealt with by public-spirited citizens in that jurisdiction.

In 1979, as president of the Canadian Bar Association, I sought to establish a mediation

centre which would enable certain kinds of disputes to be resolved amicably through mediation rather than through the courts. Now, I take no credit for that particular initiative, because I learned about it as having been very successful in the United States and I sought to introduce it as a test in Canada to see if it could work in this province.

It is my belief that social problems command a social solution rather than a legal solution. A failure to pay rent may have legal connotations, but the basic problem is a social problem. What is the reason the tenant cannot pay the rent? The difficulty between landlord and tenant can often be resolved in a nonlegal atmosphere by a mediator. Similarly, if a boyhood prank results in damage to a neighbour, it is better that the problem be resolved through a mediator than have the boy's name put on a police blotter with criminal consequences.

It was contemplated that dedicated lay personnel would constitute the basic core of mediators, and that is what took place. It was thus expected that the mediation system would relieve the congestion of the provincial court.

As a result of that initiative, an experiment was undertaken by the Canadian Bar Foundation in the Windsor-Essex region. The Donner Canadian Foundation funded the project at Windsor-Essex for three years. That is referred to in this report. A report was made by John Jennings, who is at this time president of the Canadian Bar Association, which was favourable to the project. After the Donner foundation funding ran out, we at the Canadian Bar Association were unable to obtain further funding from either the province or the profession—and I think that is sad. The project died. I believe that such a result was most unfortunate. Mediation centres have been successful in the United States and there is no reason, in my opinion, why they cannot be equally successful in this province.

Mediation in general: Mediation as a technique can be used in many contexts. Mediation has been successful in labour matters, family matters, environmental matters and even, as I have indicated, in some criminal cases. Consideration should be given to some formal institutionalized mediation in a manner similar to what this province has put into effect in labour relations.

However, it must be recognized that mediation is not appropriate to all situations. It will not, in my opinion, operate smoothly where there is an imbalance between the parties—and therefore

there is a reluctance to co-operate in the sense in which I expressed it earlier—or where the matter is so complex that it involves a more legalistic atmosphere.

Arbitration, and I am again speaking generally, may take place in at least three separate ways: first, in what is called an ad hoc situation, where the parties themselves agree and appoint an arbitrator, as took place in that instance of the two insurance companies I mentioned; second, a statutory provision defining an arbitration resolution to a defined matter, and the labour context is a good example; or third, an institutionalized arbitration, which I will refer to in a moment.

An ad hoc arbitrator: Many contracts of a commercial nature include an arbitration clause. In Ontario, many of these contracts do not refer to any arbitration act or to any system of arbitration. The appointment of an arbitrator and the rules as to the procedure of the arbitration depend upon the parties and the submission, which of course is an agreement between them, that they make.

An arbitration clause in a commercial contract does not, of course, preclude recourse to the court. The court has the discretion of whether a stay will be granted or refused. When the matter is one involving principally questions of fact, the court leans in favour of arbitration. The onus is on the person resisting the stay. The courts are now tending to support arbitration where the parties have chosen that mechanism for the resolution of their dispute.

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I can point to cases where it is expressed that the court is reluctant too often—although the expressions that I have given you are from court cases—to turn a matter over to arbitrators at this particular point of time, in my opinion. It has been expressed—and I think the late Mr Justice Schroeder expressed it—that the courts are jealous of their function. One must recognize that they are going to move slowly into giving up their authority. It is not going to come quickly; it is coming. But that is one reason, in my opinion, for this slow development. The courts have to become convinced, as the public must become convinced, that alternative dispute resolution is in the public interest, in their interest and in the interest of the profession.

For that reason, I have made this comment. However, consideration might be given to amendment to the Arbitrations Act or the rules of civil procedure in the Courts of Justice Act to require the parties who have chosen arbitration to proceed initially according to the mechanism

they have chosen, rather than have the matter dealt with initially by the courts as to whether or not there is going to be a stay. The statute would require the parties to enforce their contract.

Where parties enter into an ad hoc arbitration without making the Arbitrations Act or any other Ontario statute applicable and there is no appeal provided for in the submission, it is unclear to me in what circumstances an application for judicial review may be undertaken by a party or the procedure to follow in challenging the matter in the courts. In any event, if as a matter of policy, errors on the face of the record are to be subject to judicial review—and I think they should be—in an ad hoc arbitration, consideration should be given to either an appropriate amendment to the Arbitrations Act or the Judicial Review Procedure Act in order to clarify the matter, clearly a detailed matter that can be examined in terms of amendment when the Arbitrations Act is being considered.

Statutory provision: The Arbitrations Act is of course the most significant statute relating to arbitration in Ontario. It defines implied terms and conditions in any arbitration, the powers and responsibility of arbitrators and the enforcement of the arbitration award. There are very many statutes in Ontario which provide for arbitration in respect of specific matters. So there are statutory bases for arbitration in this province.

The third item is institutional arbitration. There are many institutions which define rules relating to arbitration and which define procedures to be followed by arbitrators. The submission to the arbitrator will define whether the arbitration is conducted under the particular statute or in accordance with the rules of the institution or other rules which the parties agree upon.

In Ontario, the Arbitrators' Institute of Canada (Ontario) Inc, is the recognized institution for arbitration in this province. I know that J. Wallace Beaton will be presenting to you a detailed submission relating to its activities. However, the institute suffers from a lack of funds. Since most of the arbitrations conducted under its auspices are conducted in confidence, the magnitude and effectiveness of its work may not be fully appreciated. And I make that comment generally relating to arbitration. Because of arbitration being a private matter, most members of the public are unaware of the many matters that are resolved by this technique and this mechanism. Yet it is a most effective way and it is a growing way of deciding matters where disputes arise.

There are many other institutions providing arbitration services. Perhaps the best known would include the American Arbitration Association, the International Chamber of Commerce and the London Court of International Arbitration. These institutions are recognized throughout the world as providing, and I have underlined this, trained arbitrators. They have developed over time rules and procedures to facilitate the hearing and prompt resolution of issues.

Court-assisted arbitrations: Consideration might be given to appropriate amendments to the Courts of Justice Act to enable arbitrators to assist the court in time-consuming matters which involve principally questions of fact rather than questions of law. I have in mind such matters as assessments of damages, mechanics' liens actions and the like. In some jurisdictions, it is made a condition of access to the court that the parties agree to arbitration in appropriate matters. I have said that because of course of the constitutional problem, the residential tenancy case and the McAvoy case as to section 96 judges. So I have put it in terms of agreement but not denying access to court. If after the arbitrator's award one party disagrees and wishes to pursue the matter, the party taking such action could, and I say "should," but could be assessed with costs.

I mention this procedure as merely one example of how arbitration may assist the courts. There is, in my view, a very significant illustration of how it worked in Montreal. In Montreal a few years ago the superior court was faced with a backlog of cases which resulted in a five-year delay between institution of proceedings and the hearings. The Chief Justice gave litigants an opportunity to have senior practitioners decide their dispute by arbitration. The co-operation of bench, bar and litigants led to a clearing up of an unacceptable backlog. Now that is an example of where arbitrators assisted the court. The parties accepted it, the parties agreed. My recollection is the senior practitioners were prepared to do it without any remuneration, but some provision as to remuneration was ultimately reached. Regardless of that aspect of it, there was a co-operation among those who were involved in the judicial system to see that arbitration could help the public and help the system.

It says "Expense of arbitration," but that heading should be "Acceptance of Arbitration." The gremlins got to work on that one. Arbitration as a dispute resolution mechanism has been generally accepted in Europe and in the United

States as a mechanism of resolving commercial disputes. It has not been generally accepted in Canada or Ontario to the same extent as it has been accepted elsewhere. Mr Justice Zuber, in his well-publicized 1987 Report of the Ontario Courts Inquiry, has drawn attention to this fact. One must question why arbitration has the advantage attributed to it as a dispute resolution mechanism yet it has not been more generally adopted in Canada and in this province.

In the first place, in Ontario we have not yet established confidence in the system, in my opinion, because we have not yet established a sufficient number of trained arbitrators in whom lawyers and business have confidence. I say this without criticism of academics, but to a large degree lawyers and businessmen have considered that arbitration was in the hands of the academics, that they were more inclined to be appointed as arbitrators. Businessmen and lawyers tend to worry that academics will bring to bear on the decision-making their pet theories of the law, and that worries them because it is uncertain. We have recourse to court. They have at least an idea of where we are going, but there is a concern. I say this without criticism of academics and especially having regard to the nature of the composition of this committee.

Miss Nicholas: This is the first time we did not get picked on.

Mr Henderson: After all, it has to be the universities. In any event, I think—

Mr Cureatz: Well put. I have been waiting for three years for that.

Mr Henderson: Well, you can see we are friends of long standing.

The Arbitrators' Institute of Canada (Ontario) Inc, made a significant step in this regard by establishing a system of certifying provincial arbitrators—that should be individual arbitrators—as chartered arbitrators. It may be that we have reached the stage where consideration should be given to the creation of a self-governing arbitration body. I have in mind a body somewhat similar to the Law Society of Upper Canada or the College of Physicians and Surgeons of Canada. Although this may be considered revolutionary, it is a matter which I believe to be worth considering. The Arbitrators' Institute constitutes an existing body upon which a base can be built.

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The Arbitrators' Institute, as in the case of many voluntary organizations, requires funding. Consideration could be given to the establish-

ment of a facility within which provincial arbitrators can hold their hearings, some kind of facility, as they do in the American Arbitration Association, where arbitrators can use and pay for the use of that facility. But the funding of it is going to be a problem. I understand that a system of that nature is in effect in British Columbia, and you will have heard from someone in that province relating to it.

Education: Some systematic training of arbitrators, in my opinion, is essential. This can be accomplished through courses at universities, law schools or by post-graduate training through seminars conducted by the Law Society of Upper Canada, the Canadian Bar Association and the Arbitrators' Institute of Canada, Ontario Section. Co-operation among bodies and appropriate departments of government can and, in my opinion, should be arranged.

Some suggestions:

1. Alternative dispute resolution, in my opinion, should be continued, encouraged and supported in the public interest.

2. A framework should be developed by government which would facilitate private arbitrations. In view of the large number of areas within provincial jurisdiction within which arbitration can operate, a study should be made to define a framework applicable to the specific subject. This is already done with respect to labour law. There is room for such a framework in the laws of contract, insurance, landlord and tenant, and you could add environment. Support should be given to the Arbitrators' Institute of Canada, Ontario Section, perhaps by way of funding, for the provision of necessary facilities.

3. The training of arbitrators, both for the general and specialized areas of arbitration, should be encouraged and, as part of the administration of justice, funded by the province. It is presently largely funded by the parties themselves. Such training should be addressed to disciplines beyond the legal profession.

4. Co-operation among the courts, institutions providing arbitration services and arbitrators should be encouraged in that arbitration should assist the courts rather than compete with them.

5. A survey of mediation services should be conducted with a view to supporting mediation in those areas where they are serving the public interest.

I will leave with Mr Arnott a copy of the mediation report which was made by Mr Jennings and which sets out the details of it.

The Acting Chair (Mr Polsinelli): Mr Henderson, thank you very much for your

presentation. It was a very thoughtful one and, I think, stimulated perhaps in the minds of the members of the committee further interest in the subject and further ideas. Normally after such a presentation there are questions, and the first academic on the committee to ask a question will be Professor McGuinty.

Mr McGuinty: Sorry?

The Acting Chair: You wanted to ask a question, professor.

Mr McGuinty: Do not call me doctor or I will send you a bill.

Mr Henderson, you clarified one aspect of this which I think I have asked everyone who has appeared before us. It seems rather strange to me now, in retrospect, that they were not aware of what you have clarified here with regard to the certifying of provincial arbitrators as chartered arbitrators.

I raised this, I think, in every instance. If you go to page 5 of your text you refer to mediators, "Dedicated lay personnel"—preferably non-academic—"would constitute the basic core of mediators." I asked that question, what would one look for in mediators?

Mr McMurtry appropriately said, "Well, for example, if it is a matter of physical injury, expertise in medicine; perhaps if it dealt with structure, maybe an engineer." But apart from that, they were not very clear on what we would look for. There is a possibility at the present time, I believe, that one could hang out a shingle as mediator, as a kind of marriage counsellor, without much regulation.

We had a very interesting presentation from a young lady from Washington yesterday and she went on to explain how they train their mediators. They interview them, then they train them and they may or may not withstand the training. Then, when they are in action, they observe them and they may or may not be retained on the basis of their performance. They are able to be this scrupulous because they pay them \$25 per case.

What would we look for? You refer to "dedicated lay personnel." It is not necessarily a lawyer, is it?

Mr Henderson: No. In terms of mediation, I would expect it would not be, because I conceive that type of activity as being outside the legal system. That does not preclude access to the legal system, because if the resolution is not effected, then recourse to the legal system is not precluded. The people who I would expect would be involved would be people in service clubs who are public-spirited citizens, people who have indicated that they would be public-spirited

citizens who would be willing to be part of an organization of this kind; and that is what happened in Windsor.

There are videotapes which explain the technique of mediation. Those people who set up the centre would have an opportunity of giving case histories relating to mediation and it would be within the scope of an institution such as the mediation centre in an urban place to set up a system of training because people who are interested will learn quickly.

In my view, mediation centres would be the way to start mediation in a municipality. That is the way they started it in the United States. There is a great deal of literature in the United States, there is a great deal of experience in the United States as to how centres can be effective. I do not know why the matter died in Windsor, whether it was because the legal profession did not like it. I know of no complaints from the legal profession.

I should point out, too, while talking about that aspect of the matter that most of these problems—social problems, as I call them, that can be solved in a social context—are problems that probably would not attract a lawyer in any event. In other words, most of them would not be ones that would be dealt with by most lawyers. There may well be some that would get to a criminal court. My view is they ought not to be in the criminal court, some of them, and that is why I think that mediation centres would have a system of training developed within the centre and they would look to public-spirited people—not limited to service clubs; I cite that as an example—that could be institutionalized within a municipality.

Mr McGuinty: Mr Tannis, in his inimitable way, referred to a large portrait—I am not sure if he said it was in your office or his own—where there are two farmers disputing over a cow.

Mr Henderson: Oh, it is in our office. That is an old one. Yes, I am aware of that one. The lawyers pulling on either end of the cow and the judge—

Mr McGuinty: No, a farmer at the horns, another farmer at the tail, and the lawyer milking the cow.

Mr Henderson: I am afraid that is right. I tried to diffuse it but it did not work. It is in our office, I regret to say.

Mr McGuinty: I told him of the large Holbein portrait of St Thomas More I contributed to my son's boardroom. Dependent upon religious affiliation of the client, the character in the portrait is identified as Martin Luther or St Thomas More.

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One other thing that you really clarified for me is that I have asked the question two or three times and everyone said there seems to be no evidence to the effect that mediation or arbitration has contributed significantly to cutting back on court congestion. I simply could not understand that. You give a crystal-clear case here on page 11 in Quebec, in Montreal, where it did happen. I find it difficult to believe that in so far as mediation or arbitration is operative, it does not. It must surely cut back on court congestion at the present time.

Mr Henderson: There is no doubt that where difficult commercial matters are arbitrated it will cut down on access to the court, because the parties take it as a final and binding process. I think the comment that has been made by those who made the representation that you have described means they look at arbitration as merely another level, and an additional level, of dispute resolution. In other words, why not go to court directly? Why have another lower level of court when you are going to go to court in any event?

That is going to happen, and I do not suggest that where the arbitrator has clearly gone wrong on the face of the record there should not be access to court, but that is minimal. I have had only one of the matters in which I have been involved in arbitration go to court, and I have been involved in at least over a dozen arbitrations. In that case, the Divisional Court said that I was out of my tree, the Provincial Court said that the Divisional Court was out of its tree, so they came back to the arbitrator and the Supreme Court of Canada refused to grant leave, so the arbitration award stood.

Mind you, in that case, it involved parties that were commercially able to take the matter further. It was not a burden. They were very obviously, by the very nature of it, financially capable of going all the way. It was not a burden there.

It could be a burden in terms of where you have one party that is strong and another party that is not strong. That could be a problem of creating another layer where the strong party merely takes the other party, the winner, to court and imposes an intolerable cost burden on it. That could happen. That is why I would much prefer to see arbitrations that are final and binding, and only in the event that one party that takes it further may be burdened with the cost of the arbitration. That tries to get around that imbalance.

Mr McGuinty: With regard to your comment that there seems to be a mindset in the courts which is not favourably disposed to this alternative means, you would have appreciated the remarks of the dean of Osgoode Hall Law School yesterday when he noted in the last five or six years a different attitude, so to speak, on the part of people coming to law schools, partly because the majority of this class, I believe, are young ladies.

Miss Nicholas: He is right.

Mr McGuinty: Yes. And he feels this idea of a lawyer assuming that the confrontational resolution of disputes is the appropriate and usual pattern is being overcome. They cannot provide enough seminars in this area for those who want to study in this field. I found that very encouraging.

Mr Henderson: The comment that I have made that judges are jealous of their jurisdiction was made more than five years ago by Mr Justice Schroeder. It is a statement that was made some time ago.

On the other hand, I was on a panel at a Canadian bar meeting about two or three years ago and some judges were still of the view that arbitration's time had not yet arrived. I think that is wrong and I think the majority of the panel took that view. I do not want to give you the impression that times are not changing. I think that times are changing and I think that less and less resistance on the part of the judiciary is present.

Mr McGuinty: How long do you think it will be before the Canadian Bar Association is dragged kicking and screaming into the 1990s?

Mr Henderson: I do not think the Canadian Bar Association can be accused of not embracing arbitration.

Mr McGuinty: But they did not support that wonderful program in Windsor.

The Acting Chair: Mr McGuinty, we have three other members of the committee who wish to ask questions. Perhaps you could make this one your last one and we could move to other members and then, if there is time, we will come back to you.

Mr McGuinty: Certainly.

Mr Henderson: Let me put that in context. I think the Canadian Bar Association does support arbitration. I think the Canadian Bar Association—Ontario has had many seminars. I have participated in some. I can assure you that the Canadian Bar Association is not antagonistic to mechanisms of creation.

Mr McGuinty: But they let the project die in Windsor-Essex.

Mr Henderson: The project died because we could not get funding. That was a time when the Canadian Bar Association did not have sufficient assets to enable it to carry it through. You have seen that the Canadian Bar Association considered that it ought to carry through. That is a pure matter of money.

Miss Nicholas: I just wanted to comment first on your comments about the Windsor-Essex Mediation Centre, because I had hoped, actually, that someone would come before us who was part of that project. Mr Jennings would be the perfect one, of course, but you have alluded to it. I have actually asked the researcher if some effort was made to bring them forward, because I was a program officer at the Donner Canadian Foundation prior to being elected in 1987. I remember I had envisioned world travel as a program officer in the Donner Canadian Foundation and my first travel, just one week into the job, was to Windsor to celebrate the second year of its operation and to extend it to a third year. I had gone to law school in Windsor, so I did not think a trip to Windsor was the highlight of my week and of my new job as a program officer.

I recollect just vaguely that it was about \$125,000 per year that the Donner Canadian Foundation put in. I think the total was \$350,000 and that included doing the reports and the surveys—something to that effect.

Mr Henderson: That may well be, yes.

Miss Nicholas: I thought at the time that was a very modest amount to maintain a mediation centre of this type. I remember an enormous amount of cases were dealt with; the number of cases that came forward was in the thousands. But now, perhaps having heard a little bit more about mediation here, one of the things that struck me in hindsight about Windsor-Essex is that I think they were very small cases.

Mr Henderson: That is right.

Miss Nicholas: They did not go into that bigger round that perhaps we are considering here. I just wonder if you had any thoughts on how Windsor-Essex could have evolved into more sophisticated cases. I know that what clogs up the courts sometimes are neighbour disputes and petty theft and so forth. That may be why we have such an enormous backlog, they should not be there, and perhaps they should be in mediation, but I am interested in how that program could have extended to perhaps bigger cases, if we can call them that.

The second thing is that although you have discussed that they were experienced mediators, I remember a lot of the law school students sometimes did a stint there. I do not know that I would call them experienced mediators, and I do not know what their role was in it.

I guess the other concern I have about dispute resolution perhaps is the training of arbitrators. I think we have all sort of hinted on that, that if the arbitrator is not trained or good, then sometimes you lose a lot of the processes that you expect in the justice system, which even alternative dispute resolution is a form of. I just wondered how that could have been improved or if indeed you thought that mediators who were in that program had enough expertise to have done other cases, more sophisticated cases perhaps?

Mr Henderson: Let me deal with the first one this way. I am not convinced that a mediation centre should be enlarged to deal with a wider scope of subject matter. I think the danger of opening it to a much wider field is to lose its purpose, because I think its purpose is to deal with those matters of a smaller nature that burden the court quite unnecessarily and that it has a very distinct function at that level of problem. To enlarge its scope may defeat its purpose. In terms of monetary value, it maybe can grow, but the average amount of settlement for mediation cases is \$1,016.

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Miss Nicholas: So that has been small claims, really.

Mr Henderson: It took over the function of the Small Claims Court, which then relieved the courts of a great deal of litigation, you are quite right, and some of those who actually mediated, and it is described here, were law students. It got them involved in the process at a very early age.

My first answer to you is that big it not necessarily better in this particular area. That would be my personal view. I would keep this function in terms of the small type of problem where the public can handle it quickly and well.

Mediation on a larger basis ought to be done, in my view, in a separate institution. It may be that there would be a different branch. I can see no problem in doing it if you add an entirely different branch or division, but keep this group doing its thing, which it does well. Add to it another group, another division, yes, but do not have these people doing something they are not really capable of doing or you will defeat the purpose.

Your second question is training. Let me give you a pool of arbitrators: retired judges. The late

Mr Justice Kelly did a lot of arbitrations for the Arbitrators' Institute of Canada. He was a member of it. Chief Justice McRuer was a great supporter of arbitration and he was part of the Arbitrators' Institute. Chief Justice Nemetz right now is doing a tremendous arbitration—when I say tremendous, I mean tremendous in terms of time and significance—in the west coast.

Here are retired judges, a pool of trained people, who are available to act as trained arbitrators, but more important, to train others. In other words, there is a pool of people who could be used to train people, because many of them want to be active and here is an opportunity for them to be active.

As to training, the Arbitrators' Institute, hopefully, will be able to develop a training system to tell the public that here are people who have had experience in arbitration.

Mediation in the centre itself will have to—and Mr Horrocks, perhaps you remember, must have helped trainees. I was not as close to it in its operation, but it must have helped these individuals who performed the function.

Miss Nicholas: In terms of a pool of arbitrators that you referred to, retired judges—

Mr Henderson: As an example.

Miss Nicholas: Yes. I just wonder, using lawyers and judges, who are used to the legal system and used to the procedures, which are very technical and sometimes very cumbersome but they have grown over the years, do you feel that they would be bringing more of those technicalities, procedures, processes from the court system into their role as arbitrators than perhaps a person without legal training or someone who had not had to rule regularly on those, and how do you think that affects the process of arbitration?

Mr Henderson: There is that danger, of course, because they have grown up and they are familiar with the trappings of a court and the way in which a court deals with it. I do not think it necessarily follows, though, that they are going to apply the courtroom technique to arbitration. At least, it has not been my experience that those who have retired and are familiar with arbitration have sought to impose on arbitration the rigid court schedule or the rigid system of the court. That has not been my experience.

It is a risk. You may get it in terms of individuals who are more formalistic than others, but I think that arbitration as conducted by experienced judicial officers can be very effective, but with a caution: I think the risk you have identified is one that one must be careful with.

Mr D. W. Smith: I have a couple of comments. I am not an academic and not a lawyer, I am a farmer, but it was interesting to hear you say that the lawyers are jealous of the courts. From some of the constituents who have come to me in my first five years of being a member, you almost get that impression and I am glad you have confirmed that one.

You talked about a milk cow. Being a farmer, I can understand that quite well and I am glad to hear a lawyer say that that really is what happened.

I heard people talk about the funding of this system, and I do not know whether anybody has actually said how much money we might be talking here or exactly how you would go about spending it. When you talk about volunteers, I wonder. Is this to go for teaching? Should we take it out of legal aid? I am guessing a little here, but I would say we give maybe close to \$300 million in legal aid a year. Would we take a portion of that to start convincing some of the legal profession that it should go this route? How do you suggest we should get this funding? Could I have some of your thoughts?

Mr Henderson: First, I do not think it should come out of legal aid. Legal aid is now an established, institutionalized system that needs all the money it can get. I think it is not in the public interest to bleed that system.

What I have in mind is support for the establishment of urban mediation centres. That is point one. That is pure funding. A group in a community would be prepared to establish a centre such the one established in Windsor. That will require a certain amount of research to see how it is done in the United States, how it got established there; research as to how it got established and operated in Windsor. I would commend you to ask John Jennings to give you a more detailed explanation as to how it operated, because my association was really to try to get it started rather than to deal with it on a day-to-day basis, but then at the end of it I did try to get the necessary funding. I could not get it from the federal or the provincial government. It just died, and I never quite knew why.

I think it should be re-examined to determine whether the centres should be started. You would have to pick your spots. In other words, I do not think there would be enough money to start it all over the place at this particular moment.

Mr D. W. Smith: So you have been talking of the leasing of rooms to start with.

Mr Henderson: And the funding of the person who is going to be in charge of it. You have to have somebody there.

Mr D. W. Smith: The administrator.

Mr Henderson: Exactly, and he has to know that he is going to be there a reasonably long period of time. He is not going to go there for a year. He is going to have to have funding for at least a sufficient time that he knows he can get it going.

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Second, when you go to a place like the American Arbitration Association, you go to a building that has hearing rooms, you have the facility, the people who can take down the transcripts, the reporters. It is there. The infrastructure is there for an arbitration system. We do not have that at the present moment. That could be created. It would be accessible to arbitrators.

Now it is conducted on a bit of a haphazard basis. It is conducted in a law office, it is conducted here, there and everywhere. Some kind of funding could be available to those institutions that conduct arbitrations and are approved by an appropriate government body to ensure that there is a system available for training. By way of example, funds could be given to the Arbitrators' Institute to conduct regular training courses, matters of that kind. In other words, as I see government's role, it is to provide the means whereby approved operational parties can perform the function. I do not think you are ever going to stop John Jones and Joe Blow coming together and appointing Mr X as an arbitrator. They do it informally. That is going to be done anyway. But the larger problems for what I call the middle-sized business company need something to enable that company to go to have arbitration made available to it.

Third, the various statutes could be examined to determine whether, as in the case of labour, arbitration is a technique that ought to be applied to the resolution of problems that arise under those statutes. One that obviously comes to mind is environmental statutes. It may well be that arbitration in an appropriate statute should be provided for as a means to resolve problems under that statute. So there are areas where government can provide that arbitration will be a technique initially used for the purpose of that subject matter.

Mr Cureatz: I am interested in pursuing your comments about your reflection on the court's jurisdiction and judges' hesitancy to release some of their areas of jurisdiction to other areas such as arbitration. I have had the occasion in my capacity as a solicitor to speak with judges formally and informally. I do not know whether

they have been canvassed or polled individually, but if there is a hesitancy—and I can see it just with my association with some of the judiciary—they actually feel that when they are presented with cases in front of them, and rightly so, they give a very fair hearing in terms of listening to all the issues and finally making a decision that, on the facts and in law, is fair to all parties concerned. I could see a great reluctance of believing that only they, with their learned positions and years of experience, are able to dispense the kind of fairness and they would be hesitant to think that someone else can. I feel otherwise.

I think there is much to be said for what your presentation has indicated, that there are great areas of relief that could be made to our judicial system. I will not have the opportunity of sitting on this committee regularly, small numbers as we do have within our own caucus, but with the brief kaleidoscope of witnesses who have appeared before the committee so far, everyone seemed to be saying more or less what you are saying, that there is an avenue there that we can delve into.

What I was wondering is, do you think it is worth while to pursue—and I do not know what the committee's format is, if you are writing a report or someone is writing this down—with the Attorney General (Mr Scott). If something like this is proposed, there have to be various avenues of approach to try to get a new partial system under way, to have an approach through the Attorney General's office to the courts, the judges, the judiciary, other people with the courts. It is not a matter to convince the judges; you have to convince everyone working within that whole sphere to say, "Look, we want to pursue an area. It may be taking jurisdiction away from you. We think it's worth while. What's your input? What do you think about it?" instead of coming down from on high and just saying, "This is how we want to do it," but to involve them.

I am just throwing this out. Through your experience, would that be worth while or is it not worth while? Would it be too frustrating? Would it be better to say to the judiciary and all those others involved in that whole area, "Listen, we've decided this is what we're going to do"?

Mr Henderson: I can give a very quick answer to that because, in my opinion, it is better to involve them. By involving them, I think you can get their co-operation.

I would certainly say to you that the Attorney General is not unfamiliar with the problems of

arbitration. Through Mr Gregory, who is a member of his staff, he sent out a questionnaire to interested individuals and institutions. I think he has a great deal of literature on the subject. I do not know whether Mr Gregory will be appearing before you or not—and I do not know his capacity at the moment, whether he is still with the Attorney General—but certainly he was designated by the Attorney General to obtain a great deal of information relating to arbitration. That is available to the Attorney General. I am sure it has been sifted out and would be useful to this committee.

I do not want to give you the impression that all judges are dead against arbitration as a means to assist the court. For instance, Judge Barry Shapiro was very supportive of arbitration while he was a member of the judiciary and when he retired he became an arbitrator. Individual members of the judiciary are still not convinced.

On whether there should be co-operation, there is no question in my mind that the matter should be discussed with the Chief Justice of the province and the Associate Chief Justice and there should be input from them. There is no question in my mind that co-operation is the way to go.

The Chair: I have one wrapup question. This committee might very well be recommending in its report to the Legislature an action plan for the government or the Attorney General to deal with the whole issue of ADR. In that context, my question refers to the second of your conclusions, where you indicate that a framework should be developed by government which would facilitate private arbitration. Then you go on to indicate that support should be given to the Arbitrators' Institute of Canada (Ontario) Inc, perhaps by way of funding for the provision of necessary facilities.

I wonder if you could elaborate on that recommendation. Basically, what do you envisage as a framework and in particular what kind of facilities and what kind of financial assistance would you be contemplating?

Mr Henderson: Yes, I had better declare my colours. I am not here representing anybody, but I happen to be the chairman of the Arbitrators' Institute foundation, which is trying to get money.

The Chair: You can wear your advocate's hat as you answer the question.

Mr Henderson: In dealing with that specific question, I had better declare my colours. Yes, the institute suffers from the fact that most people are not aware that it is there. Let me give you an

example of that. A group of lawyers got together and decided that they would rent a judge and that they were going to provide the facility of arbitration. It already exists and it seemed to me to be reinventing the wheel. Therefore, it seems to me that where there is an established body which is not limited to lawyers—arbitrators in the Arbitrators' Institute are engineers and retired businessmen—in my opinion, that is the way it should be. It is a composite group. It needs support. Whether it is the sole institution to be supported is a matter of policy that would have to be determined, and it may be inappropriate to have one institute supported. I can appreciate that.

On the other hand, here is a body providing service at this particular moment which, in my opinion, is effective and it needs support. So some funding for training could well be established, some funding to establish space that is available for arbitration which would be paid for on an individual arbitration basis. As long as certain standards are met, as set by government, then they would be assisted. In other words, you may wish to define "standards" which would be conditions precedent for support. But a fund available to support arbitration is what I have in mind, and bricks and mortar, people, training, that type of thing.

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The Chair: When you say that a framework should be developed by government which would facilitate private arbitrations, are you contemplating a legislative framework that would refer to particular statutes type of, I guess, proceedings and so on and so forth?

Mr Henderson: Yes, at some point. Whether we reach that stage or not is again, I put it, a matter of policy that you would have to determine, or it may be in the interests of the public to have some form of society similar to the Law Society of Upper Canada, a similar statute. A framework of that kind is what I had in mind, a statutory framework which would enable a law society or a similar type of organization to deal with arbitrations in the province.

The Chair: In a sense, to institutionalize the process.

Mr Henderson: Exactly. But the whole process would be carried out as the law society is. Call it self-governing.

The Chair: Thank you very much. Are there any further questions? If not, then I sincerely want to thank Mr Henderson for coming before the committee and sharing his ideas and recom-

mendations with us. I am sure that some of his comments and recommendations will find themselves in the final report to the Legislature. Thank you very much. We appreciate it.

Miss Nicholas: Mr Chairman, I just wonder if we have anybody who is coming before us—and looking at the agenda, I do not see it—who is opposed to arbitration or alternative dispute resolution, who might express serious and grave concerns. I know we are just dealing with what we can do and I think Mr Henderson brought up a couple of concerns that he had of where we should limit it, but I am just a bit worried. I had lunch with a lawyer yesterday, and when I told her what we were doing this week, she sort of cringed and started expressing to me a whole list of concerns she had, although she is not an expert in the area. I just wonder if we have invited anyone or anyone expressed interest, or is everybody in favour of it?

The Chair: I will refer the question to Mr Fenson.

Mr Fenson: I assumed, and it has been partially borne out, that some of the practising lawyers have certain cautions and anxieties, but so far they have not been as violent as I expected in some cases.

Miss Nicholas: Mr Henderson did bring up that his focus would be on smaller cases, but it twiggd only because I think he is the first one who really has tried to slot it into a certain area for us. I do not know if that is because our questions are not eliciting those kind of responses or if in fact it is because they are in favour of it and they are just trying to get it going in some kind of form.

The Chair: I do know that at least one of the presenters in the family law section will be expressing some reservations about the process.

Miss Nicholas: I just have that little bit of caution.

The Chair: We are basically on a fact-finding mission as much as anything else and we are certainly very willing to receive recommendations from any committee members or from any of the witnesses who appear before us as to who should be extended invitations to come before the committee. If you have any suggestions to make, we are having a subcommittee meeting tomorrow to deal with an assessment of the proceedings to date. If you have any specific recommendations, then I would certainly appreciate your submitting them.

Interjections.

The Chair: I understood Mr Kanter was the Liberal representative on the subcommittee and that he has already been invited and will be attending the meeting tomorrow.

Miss Nicholas: Okay.

Mr Polsinelli: That is fine.

The Chair: Our next witness is Dean Peachey, co-ordinator of The Network: Interaction for Conflict Resolution in Kitchener, which is an important clearing house for dispute resolution programs across Canada. I would ask Mr Peachey to please come forward.

THE NETWORK: INTERACTION FOR CONFLICT RESOLUTION

Mr Peachey: Thank you. It is a pleasure to be with you on this Valentine's Day to talk about matters that have long been dear to my heart, so I can make some connection here.

I do represent The Network: Interaction for Conflict Resolution, which is a network of organizations and individuals throughout Canada that are interested in developing fairer and more effective dispute resolution mechanisms. Our membership reflects the spectrum of activities that this committee will be examining during the course of these hearings. Our mandate also extends beyond the formal dispute resolution mechanisms and alternatives to the court to include promoting better conflict resolution in a variety of informal settings, in the workplace, on the job, in schools and different community institutions.

The Network exists to foster the exchange of information ideas that will guide the development of improved dispute resolution services for all Canadians. The Network compiles directories of dispute resolution programs throughout Canada, publishes a newsletter and a variety of informational packages, promotes the development of public policy in this area, organizes training seminars and conferences and so forth.

Last year, for example, we cosponsored the North American Conference on Peacemaking and Conflict Resolution, which brought together 1,000 participants from 22 countries to Montreal. This summer we will be hosting a national conference, Interaction 1990. That will take place in July in Ottawa. This also is a gathering that will address a broad range of conflict resolution issues in Canada.

In the past year we have also convened two meetings of representatives of a variety of national and provincial organizations that are active in dispute resolution to discover how these groups can maximize their efficiency through

working together on joint education, research and policy projects.

The Network is a registered charitable organization. It is governed by a national board of directors. Judge Paul Niedermayer of Dartmouth is the chair of the board. Our national office and resource centre are located in Kitchener and I serve as the staff co-ordinator for the Network.

Just a few comments of introduction on myself: I am a psychologist. I have devoted my academic background, my research, primarily to areas of conflict resolution. I became involved 11 years ago in founding what is now the longest-running community mediation project in the country in Kitchener, because there were not many of us around at that time with those interests in doing those activities at that time. I received many invitations to provide training and consulting in different parts of the country and I have had the opportunity to travel the length and breadth of this country in metropolitan areas, but also in small communities, native communities and so forth, and see what has happened and see the interest in a great variety of settings. That has been most exciting for me, most encouraging and most rewarding.

We founded the Network five years ago to formalize ways for interacting and sharing information to avoid needing to reinvent the wheel as programs and activities develop. I have also had the opportunity to serve on a couple of boards for national organizations in the United States. I have been able to observe the developments there and benefit, learn from their activities; in some cases, I think, to avoid some mistakes and grow in slightly different directions.

Since its inception in 1985, the Network has developed as the broadest and perhaps the most comprehensive dispute resolution network or association in Canada, although I am quick to add that the Network is far from fully developed. The accelerating growth of conflict resolution activities and interest in various provinces poses a real challenge for anyone wishing to stay abreast of current developments, so I will offer first some reflections and observations on broad trends and issues throughout the country and then focus more particularly on issues and needs of concern within Ontario.

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I am, mercifully, one of the last introductory presentations that this committee will need to sit through and I am assuming that by this time you have probably received a lot of information, numbers, data and so forth, so I am going to take

a much more personal, reflective, anecdotal approach in trying to draw together and reflect on what I see as some emerging issues.

First of all, gradually I see a growing willingness to consider a whole variety of options. As I talked with many individuals 10 years ago, I used to hear repeatedly, "Well, the system"—meaning our current system of civil and legal courts—"may not be perfect, but it's the best we have." I have observed that, a scant decade later, that view still exists, but I hear such comments much less frequently. Today people are much less likely to assume that the past practice was the only way to operate and are open to considering approaches that are distinctly different, distinctly innovative, and there is interest in a variety of provinces and federally, a variety of attorneys general, in these matters now.

The views have undoubtedly shifted because the innovations have proven effective. They are beginning to stand the test of time. They have been around for a while now. We have solid examples of very diverse applications of mediation, arbitration and other conflict resolution methods to Canadian situations. Whether it is the high volume of small claims cases going through mediation in Montreal, a large case load of increasingly significant, serious criminal complaints in Winnipeg, personal injury suits in Toronto or the excruciatingly difficult matters of separation and divorce throughout the country, we are seeing viable working examples. The activity has even spread to arenas far from the justice system, such as elementary schools that report an improvement in learning climate through the introduction of peer mediation programs to deal with a range of conflict and behavioural problems.

The second trend that I observe nationally is that increasingly the applications are to significant and difficult cases. It is increasingly clear that the dispute resolution methods we are talking about are not alternative procedures for minor cases.

The experience of the American Bar Association as it has searched for nomenclature here is perhaps instructive. In the late 1970s, the ABA established a committee on the resolution of minor disputes. In a few years that name was unsatisfactory, "minor" was dropped and it became the committee on alternative means of dispute resolution. More recently, it has become the committee on dispute resolution, period, no "alternative," no "minor."

Yes, it is true that negotiation, mediation, arbitration and other methods can be applied with great success to cases that would seem too trivial or too costly to process through the legal system, but we are increasingly learning that the effort and energy of these problem-solving approaches is perhaps most appropriately directed towards those cases that have the greatest consequence.

Whether it concerns the mental and physical wellbeing of children caught in the confusion and pain of divorce or the tremendous public investment in major environmental disputes, as a society we can ill afford the very real costs of having these matters tied up in a process that is too often used—or too often abused—to delay, to intimidate or to punish rather than to seek the efficient resolution to issues of vital importance.

This is not to deny in any way the role for legal process or precedent, but simply to suggest that litigation or litigious actions should truly be seen as a matter of exception rather than conventional practice.

Another observation nationally is that things are still fairly sporadic. Although there are clear examples of successful projects throughout Canada, most Canadian dispute resolution efforts are sporadic at best. Nationally there are approximately 50 programs dealing with community or criminal cases and a recent directory lists 200 providers for family mediation. Even that is relatively small when you spread that across our population.

In all other areas, though, it is a mere handful of individuals or groups who are leading the way. In none of the provinces are there comprehensive or systematic services available, such as there are in some American jurisdictions.

I think there are several factors at play in this current situation. One is the relative absence of national policy, legislation or financial support for these activities. The services that exist have generally developed in the absence of public commitment or leadership rather than in response to such initiatives. A notable example to that perhaps is in the divorce area, where both the federal Divorce Act and some relevant provincial legislation have encouraged the use of mediation and the subsequent growth in public utilization and acceptance of this area has subsequently been apparent.

Another critical factor for this committee to bear in mind is that dispute resolution work is a difficult, demanding activity. There are no quick fixes. There are no slick formulas or sure-fire models for addressing entrenched human conflict. A simple training package will not do it,

and simply providing money for programs to pop up like fast-food franchises will not work either.

Almost without exception, the strong and viable services that I have observed and have been referring to arise from the prolonged efforts of individuals of, I think, particular imagination, commitment, skill and perseverance. These are people who are and have been true believers, in the best sense of that term, and who have been prepared to expend energy and sacrifice to turn their vision into reality. Although there are many different types of background, education and training that can make for effective dispute resolvers, this is not an area for the faint of heart, and those who are looking for a quick new career are likely to be bound for disappointment.

Another observation nationally is, particularly within the last couple of years, a growing convergence of efforts. Initiatives that have emerged regionally or within various occupational and professional areas are increasingly coming together to further matters of common interest.

I referred earlier to the initiative of the Network in convening two meetings of the national consultation on dispute resolution last year. These meetings, held in Quebec and British Columbia, were attended by approximately a dozen representatives of national, provincial and university groups concerned with dispute resolution work. There is a growing willingness to work across lines of professional training and background to develop richer and better resources for this growing field of endeavour. The groups representing these consultations plan to continue regular meetings, develop joint publications and share information and resources and research among themselves.

Finally, there are out there across the country a great many questions still awaiting answers. We possess a growing body of knowledge about what works in dispute resolution, but there is still an awful lot to be learned. There is no clear consensus on the best techniques or methods to be applied to a particular situation, or whether these services should be provided through government or private channels, offered as a public service or for profit. It is clear that many different types of training can produce quality services, but it is not clear what accountability mechanisms best ensure continued quality of service for the public. In these regards, this field faces the same challenges that are perennially before other disciplines.

Over the next two years, however, the Network anticipates working with a broad

spectrum of government and private organizations to prepare a very thorough consultation document that will address many of these issues.

Shifting now to issues and needs within Ontario, I would like to focus on a couple of things specifically.

The first, and I am sure it is not surprising and not the first time this committee has heard this, has to do with funding. I know of no polite way of saying that Ontario appears to have done its best to ignore dispute resolution in so far as expending public resources is concerned. There are many aspects of this work that do not require public resources. As I indicated earlier, an infusion of public funding would not automatically ensure quality services.

However, there are many situations where even modest amounts of provincial funding, coupled with private sources or other levels of government, would mean the difference between marginal and stable operations, would enable groups to concentrate on service delivery rather than fund-raising projects. It would, as Mr Henderson was mentioning earlier, provide for modest training packages and so forth.

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The situation regarding provincial funding can only improve, and I am confident that it will do so in the near future. It will be important, though, for provincial funding initiatives to provide at least modest levels of ongoing support. This work is not well served by short-term funding ventures without a clear commitment to the longer term and to continuing services once they have been proven to be effective.

Second is the matter of policy support, and here, although funding is vital, to me it is of secondary importance to the policy leadership that can be provided by the province. For something over a decade, ministers responsible for the administration of justice in Ontario have declined to endorse dispute resolution initiatives that have proven viable in other jurisdictions. This has been particularly true in relation to the uses of mediation to deal with select criminal cases out of court, to take them out of that process all together.

There are judges, crown attorneys and probation officers in Ontario who are ready to make greater use of mediation and other approaches if given simply the approval to do so. It has been sad for me to observe over the years as various communities have developed plans for such services, only to have those plans and those feasibility studies and so forth wither from what could best be termed provincial indifference, or

in some places, very clear and specific resistance.

In this connection, there is a need for a thorough examination of all areas where even slight modification to policies could greatly enhance the administration of justice. The work of this committee is certainly a very positive step in this area. It is to be applauded, as are the current efforts being undertaken by the Attorney General through the task force on court reform, the very public indications of strong personal interest on the part of Mr Scott himself and so forth. I look forward to the day when these growing signs of interest will be manifest in the systematic policy of the government.

My final comment in terms of needs and issues within Ontario is perhaps the most elusive, but I think it is also the most critical. It is significant that this committee is called the standing committee on administration of justice. "Justice" is in the title. It is not the committee on dispute processing or the committee on legal procedures or some other process-oriented designation.

Justice is indeed the goal, even though we oft-times despair of achieving a somewhat noble and laudable objective, but I am struck repeatedly in my work with the fact that the paramount consideration of people in a dispute is not whether their mediator or their lawyer or whoever is using correct technique or correct procedure but whether the parties are in fact obtaining a sense of justice. I would suggest the ultimate gauge of any problem-solving procedure is quite simply the quality of justice that it provides to the parties and to society at large.

Justice is multifaceted. It is elusive. It has different faces for different people and different situations. Sometimes justice is experienced as retribution for punishing a perpetrator, and other times it is achieved only through restitution or compensation. Sometimes justice means making right that which was broken or harmed. Sometimes it means restoring or renewing relationships and healing hurts and memories.

The true value of dispute resolution procedures, I would suggest, lies in their capacity to deliver these different kinds of fairness that match the merits of the situation. In dispute resolution, as in law, there is a tendency that must be resisted to become overly reliant upon process, techniques or standards of practice. We must bear in mind the dangers, as well as the merits, of that which becomes depersonalized or institutionalized.

Problem solving and justice making are often personal. Even for corporate entities, there are

many considerations apart from the bottom line. They require commitment, sensitivity and old-fashioned regard for the needs of all concerned. I close with the comments that Judge Marvin Zuker delivered to a conference last fall on United States-Canadian conflict resolution. Judge Zuker said:

"The major thrust of the alternative dispute resolution movement in the United States has been dissatisfaction with the legal system. American courts have become seriously congested, resulting in long delays. Legal costs are soaring.... By contrast, the original driving force behind the alternative dispute resolution movement in Canada has been those who promote alternatives to adversarial processes as an expression of their philosophical approach to conflict resolution."

The Canadian in me takes, I think, distinct pleasure in Judge Zuker's observation. Concerns for informality, cost savings and speedier resolution are real and valid, but I sincerely hope that they are never allowed to overshadow the fundamental purposes of the administration of justice.

I wish to thank the committee for this opportunity to offer my reflections for your consideration. I also want to be clear that these are my personal reflections. Given the relatively short time frame since the invitation to appear here, it was not possible to circulate this to our national board and have it adopt it, so I have not presented official statements or positions or recommendations. I am speaking as an individual, not on behalf of the board of the Network. I do not hesitate, however, to volunteer the services of the Network in any way we can be of further assistance to this committee, with research, policy development or more specific recommendations, if you would invite those. I commend you for your interest and wish you well in the opportune task that lies ahead.

The Chair: Mr Peachey, I have got a number of questions. I think Mr Smith's is the only other hand I have seen so far. I would like to put a couple of things into context, if I may. First of all, I am advised that you are a psychologist and not a lawyer. The only other witness we have had who is not a lawyer was also an administrator or co-ordinator, so to speak, and that was Melinda Ostermeyer, who was the chief deputy clerk of the multi-door dispute resolution division in the District of Columbia. Now, is there any tension between lawyers and nonlawyers in the field? Have you sensed any turf protection in your job as co-ordinator in terms of lawyers thinking that

the justice area should be administered by lawyers? Can you respond to that?

Mr Peachey: There is certainly some tendency for various professional groupings, be those lawyers, psychologists, social workers or whoever, to try to claim some turf and stake it out as their own. We are seeing some of that in this area. As I have observed, that has been much more pronounced and much more vociferous in the United States. A number of us have made very deliberate concerted efforts within Canada to try to avoid some of that. One of the things that the Network very deliberately does is try to structure the participation and the interaction and bringing together of the various perspectives, both legal and nonlegal, on this area.

I really do not see that as a major concern. It is one certainly that people raise and say, "What is happening there?" Generally, I observe the legal community, the mental health community and so forth by and large working hand in hand around areas of common concern, recognizing that there are clear insights and perspectives that each approach brings, and there is value to be gathered from all of them.

The Chair: I am also told that—correct me if I am mistaken—you are also involved in training nonlawyers in the field of ADR. Is there any merit in a crossover of professions in terms of imparting their various knowledge, so that if nonprofessionals are going to be trained in ADR perhaps they could have the legal input and vice versa?

Mr Peachey: Very much. It is very common to have interdisciplinary training teams. I am frequently doing training work with someone from a legal background in providing that training. I have fun with the training. If I am training a group of lawyers, I tell them quite up front, "You're going to need to unlearn some things that you learned in law school if you're going to function effectively in this realm." When I am talking to a group of psychologists or social workers, I tell them, "You're going to need to unlearn some things that you learned in your training for therapy and counselling." I am quite explicit about that. But seeing the great value of crossover, the research that is out there, there is nothing that I have seen to indicate that any one professional or occupational training background necessarily results in greater effectiveness, greater success of the professionals.

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The Chair: Mr Henderson, the previous witness, made a recommendation that there be a

framework established in Ontario to deal with the whole area of alternative dispute resolution, and he suggested a self-governing body such as the law society or the college of physicians or what have you. First of all, would you agree with that recommendation? Second, should it be interdisciplinary in the sense that it should have lawyers, psychologists and, I guess, other professions involved?

Mr Peachey: Any such body, in my view, should very definitely be deliberately diverse and deliberately reflect different occupational and professional backgrounds. The exact form of such a body is not clear in my mind, as to what that should look like, how it should be structured. I do not think we have clear models in Canadian jurisdictions as to what that should look like. I think the development of that type of thing really needs to be the result of a very deliberate process of discussion, dialogue and consultation among a variety of groups, both within and outside the government. As to what format that should take, I cannot offer a specific blueprint for the architecture of that.

The Chair: You mention that there is no systematic policy in Ontario to deal with ADR. That is one of the reasons this committee is dealing with the issue. Do you have any specific advice you could give the Legislature or the Attorney General in terms of a process to establish a systematic policy, or what that systematic policy should entail?

Mr Peachey: I think a number of the initiatives under way within the Ministry of the Attorney General are moving in that direction. The reports that have been done looking at the reform of the court system and the current task force in operation I think are moving in that direction. I think that so long as the Attorney General continues to invite the advice and support of a variety of groups from a variety of different disciplines, a good result will emerge. I think that the work of this committee will feed into that and will contribute to it in very specific ways.

As I looked at the list of witnesses who have been invited to this committee, I was very impressed. As I talked earlier with the research officer, a couple of weeks ago, in terms of who was coming and so forth, it very much looked to me as if your staff had done their homework and covered their bases very well. I think you have done a good job in terms of whom you have invited; the different perspectives are represented. I do not have a great deal to sort of critique in that regard. I think if the testimony that is

provided here is acted upon and moves forward, I am looking forward to it.

Mr D. W. Smith: It is interesting that you would make the comments that some of your trainees would have to unlearn some of the things they have learned through their formal education. It would seem to me that our education system maybe is even a little worse than we have been led to believe. But you, along with all rest of the people, have mentioned funds not being available from the province. Maybe we are a little bit of a grinch in this area.

You have mentioned the word "modest." What do you consider are modest amounts of funding that should go to ADR or this Arbitrators' Institute of Canada, for instance? What would your figures in modest amounts be?

Mr Peachey: I am not looking for the government to create huge new spending categories, but I can think of a number of situations where there have been groups within the province that are providing or wanting to provide services of one type or another, where a few thousand dollars a year would make the difference in terms of being able to obtain some matching federal, municipal or provincial money or private funds or where it would complement fee-for-service activity that they are currently undertaking. There could be smallish amounts that would be provided on a predictable, stable basis so that people could know that is there and build their funding strategy around it and so forth.

I do not think you are necessarily looking at huge amounts. We have seen examples where community dispute resolution programs might run for \$150,000 a year; we have also seen where they might run for \$30,000 a year. I think we need to look at what is appropriate for a particular community. It does not need to be expensive and the cost certainly does not need to all be provincial in any way.

Mr D. W. Smith: So if the province were to, say, start off—I am just talking here on my own—\$50,000 might do something or it may be quite a bit.

Mr Peachey: Indeed it would be.

The Chair: I have one wrapup question and it comes out of your abbreviated biography here which indicates that you are co-ordinating a conference this summer on ADR programs across Canada. I wonder if you could very briefly state what that is. Speaking of funding, could you indicate how that is being funded and what it hopes to achieve?

Mr Peachey: The conference will be held 11 to 14 July at the Chateau Laurier in Ottawa. The format is a bit different from some conferences in that the mornings are all devoted to in-depth skill-training workshops on negotiation, mediation and so forth. Those are hands-on training sessions. The afternoons are devoted to more traditional panel discussions, plenaries and so forth, on a variety of topics. The topics that will be covered range on everything from teaching creative conflict resolution skills to children to the use of ADR in the corporate community within government regulatory agencies, the criminal justice system, family mediation—basically the whole spectrum of things.

As a part of that conference, we will be looking at a draft discussion document that will get input and response from a variety of people in Canada in terms of what are some approaches that should be taken in terms of standards, accountability, training and so on and using that conference to kick off that whole discussion and consultation process over the next couple of years.

It is being funded primarily through the revenue of the registration and advertisers and so forth there. We are anticipating a small grant, a contribution of perhaps \$13,000, from the federal government and we are putting an application in to the Attorney General to also assist with the conference for, again, a small amount, perhaps \$10,000, since it is in this province. Apart from that, it would be self-supporting.

The Chair: Are any efforts being made to attract bureaucrats, officials of the various ministries of the Attorney General of the provinces so that the message on ADR perhaps can get into government for government action maybe more so than it has in the past?

Mr Peachey: We see very much the need to use conferences of that type strategically in terms of inviting people to the program. Because it is in Ottawa, we are focusing to a considerable extent on federal senior management personnel and so forth. Because they are there, it is easy for them to get to and so forth, and we are focusing on that perhaps more than some of the provinces. That is also something we want to consider.

The Chair: Thank you. Mr Peachey, we certainly appreciate your brief and comments. I am sure that some of your comments and recommendations will find themselves in the final report when it is written. Thank you once again for coming.

We are going to adjourn momentarily, but we are going to reconvene in room 151 just for this afternoon. There are two documents that have been distributed which will be necessary for this afternoon and we ask you to bring those with you. We will be back here tomorrow morning. The reason we are going into the other room is that there may be a need for translation services for one of the witnesses. So you can leave your materials here except for those two documents that will be required for this afternoon. We will adjourn until 2 pm this afternoon in room 151.

The committee recessed at 1200.

AFTERNOON SITTING

The committee resumed at 1407 in room 151.

The Chair: I would like to convene this session of the standing committee on administration of justice. The justice committee is in the third day of an inquiry into the status of the alternative dispute resolution process in the province of Ontario.

By way of summary, I want to repeat the witnesses from whom we have heard submissions so far this week. They include Shin Imai, who is a counsel with the court reform task force of the Ministry of the Attorney General; Michael Cochrane, who is counsel with the policy development division, Ministry of the Attorney General; William R. McMurtry, QC, counsel and senior partner of Blaney McMurtry Stapells and chair of the Advocates' Society committee on alternative dispute resolution; John Kelly, partner in the firm of Blaney McMurtry Stapells and a member of the Canadian Bar Association's task force on alternative dispute resolution.

Yesterday we heard from Ernest Tannis, who is an Ottawa lawyer and co-founder of the Dispute Resolution Centre of Ottawa-Carleton and executive director of the Canadian Institute for Conflict Resolution. We also heard from Ms Melinda Ostermeyer, who is chief deputy clerk of the multi-door dispute resolution division of the Superior Court of the District of Columbia, and Professor Paul Emond, professor of Osgoode Hall Law School and law publisher. This morning we heard from Gordon Henderson, QC, partner with the firm of Gowling, Strathy and Henderson from Ottawa, and Dean Peachey, who is co-ordinator of The Network: Interaction for Conflict Resolution in Kitchener, which is an important clearinghouse for dispute resolution programs across Canada.

We are getting ready now to hear another witness, Ms Christiane Coulombe, who is a lawyer in charge of the Montreal office of the Quebec small claims court's voluntary mediation service. I will ask Ms Coulombe to please make her presentation, after which we will have an opportunity to ask some questions. Thank you.

PROVINCIAL SMALL CLAIMS
MEDIATION SERVICE

SERVICE PROVINCIAL DE MÉDIATION
AUX PETITES CRÉANCES

Ms Coulombe: Thank you very much. I am very pleased to meet you, everybody. You will

excuse my English, it is not perfect, but anyway, I will try. I am pleased to explain to you our provincial service of mediation for small claims court.

Since 1971 the courts of Quebec has included a small claims division before which creditors and debtors may represent themselves without a lawyer. That jurisdiction is limited to contracts, quasi contracts and tort involving amounts of \$1,000 or less. For the past few years, the Department of Justice has been offering mediation services for those small claims. In fact, the service has been permanent since 1987, but it was a result of a pilot experiment instigated in Montreal in 1981 with a part-time mediator, and as soon as it seemed to be a nice experience, it became permanent. Since 1986 it has been open in Montreal, Quebec City, Laval and Hull.

The service is an administrative one; it is not a component of the court. It is a component of the service of the Department of Justice. The service is made up of four mediator-lawyers. One is in the courthouse of Quebec, and the three others are in Montreal. From Montreal they go to Laval and Hull, because there are not enough files in those two districts to have somebody there full-time.

Mediation is voluntary, as you said. It is an option offered to the applicant by the clerk of the small claims division of the Court of Quebec, who interviews the applicant. If the applicant agrees, which is the case about 70 per cent of the time, the applicant who met with a clerk will agree to go to mediation. Then, if the applicant agrees, a form is sent to the respondent, and the respondent will accept the mediation or not. In about 45 per cent of the cases, the respondent agrees to go to mediation. Then the service receives the file and we communicate with both parties for a session of mediation on their case. The delay is about two months from the request for mediation, so it is not very long. It is less long than going in front of a judge, because the delay is about between eight months and one year.

The mediation is carried on during a private, one-hour meeting in which each party speaks freely and they attempt to find their own solution to the problem. The mediator-lawyer assists them and informs them of their respective rights and tries to find some imaginative solution to help the parties.

The agreements are put down in writing, in general, and consist of the payment of a sum of

money. In this case, they can be ratified by a clerk of the court as a judgement of the court. So those kinds of agreements put an end to the disputes, and if they are not respected, they are enforceable as an order of the court, which is of interest to the parties because they will not have to come back to enforce the agreement if the other party does not keep his word.

The agreements are not necessarily signed in the presence of the mediator, because the mediator may wish to contact a witness or to allow the parties to have extra time to think about an offer of settlement. The solutions are not always in money. They can be providing services or sometimes excuses will just satisfy the plaintiff.

If the case cannot be settled, the mediator-lawyer will provide the party with the information on the evidence which he will have to present in front of a judge and prepare for that purpose a concise summary of his allegations for the judge. Almost 80 per cent of the disputes which are referred in front of a mediator are settled at that stage and the agreements effected by the parties are respected in 99 per cent of the cases because the people who agree to pay something or to do something do it. It is not like a judgement. By comparison, 30 or 35 per cent of judgements must be enforced.

The small claims mediation service was set up to improve access to justice and to meet the need for humanizing services, as was expressed by the Department of Justice at that time. It also reflects a current trend, prevailing especially in the United States, which consists of using negotiation and mediation rather than the judicial process to resolve conflicts. There was also another objective, which was to reduce the waiting period for a hearing in the small claims division and to allow the judge to be assigned more complex cases.

We made a survey between November 1988 and April 1989 and we think that the humanization and accessibility goals have been reached because that survey showed us that 80 per cent of the respondents were said to be satisfied or very satisfied with the service and also very satisfied with the advice they received from the lawyer. Even if their case was not settled, they would come again in a mediation service.

The kind of cases we have are civil cases like travel, car repairs, consumer problems, condominium payments, all torts, insurance cases and neighbourhood problems. These are all the types of cases which are going into mediation.

The qualities most appreciated by the creditors and the debtors are the simplicity, the absence of formalities and stress. They like very much the privacy. They do not like to go in court. If everybody can have access to their case, a lot do not like that at all. They also appreciate the usefulness of the advice they receive and the rigorously kept appointments and the fact that witnesses do not have to be present since they may be reached by telephone by the mediator. So the witness does not have to come into court. This is also interesting for the people because some witnesses do not want to come into court because they lose time or some expert witness will ask to be paid to go into court and so they do not have to come. It is an advantage for the people.

They also appreciated the impartiality of the mediators, the fact that they themselves can choose their solution and that mediation often helps to clarify some situations. It helps companies to keep clients or it helps for good neighbours, all things like that.

1420

As for the second objective, which was to reduce the waiting period for hearings, it is more difficult to see if it was reached because they are stable. There are many other factors such as the number of judges and the number of cases which have an influence on the waiting period, so it is not really an objective. But we must know that the number of the cases settled through mediation represents about 25 per cent of the judgements delivered, so that is quite a lot less judgements for the judge.

After that, I have statistics, figures, which show if the people accept or not the mediation and how much mediation by year in a district. I think you have those figures.

The Chair: Thank you very much, Ms Coulombe. I understand that there are a number of questions that members of the committee want to put to you. The first questioner is Mr Sterling.

Mr Sterling: Thank you very much for coming here today. I appreciate it very much. I represent an area in the Ottawa-Carleton area.

The Chair: Should you need translation—

Ms Coulombe: I understand.

Mr Sterling: Okay. The chairman also comes from the Ottawa-Carleton area. We actually both have practised law in that area. I have heard good things about the small claims court in Quebec and actually asked this committee to invite somebody here to talk about it.

Could I ask you not only questions about your brief but about the small claims court? Generally speaking, in the civil law system the judge has a greater role to play in the hearing than in our common law system. In this small claims court in Quebec, do you exclude lawyers totally?

Ms Coulombe: Yes. I would point out that I am not a judge so I do not want to speak of what happens in the court, because I do not know exactly. But, yes, in the small claims division there is no lawyer, except if there is an important question of law and for that the parties must ask permission to have a lawyer. Except for those cases, there is no lawyer.

Mr Sterling: What about agents? We have in Ontario people who are called legal—what are they called?

Mr Polsinelli: Paralegals.

Mr Sterling: Paralegals. Paralegal people often go into court or a lot of the people who do collection work have an agent who becomes very knowledgeable in doing that. Are they allowed into the small claims court?

Ms Coulombe: In the small claims court just an individual can sue first. It is not open to companies, corporations, first. But you can sue a corporation. That corporation can be represented only by an employee in its service, and the agent that you are speaking of cannot file a case in the small claims court.

Mr Sterling: Where does a corporation sue for—let's say somebody does not pay his bills and buys some furniture for \$500? Where do they sue?

Ms Coulombe: They have to sue to the court of the ordinary division. But if it is an amount of less than \$1,000 and they sue an individual, the individual can referee the case to the small claims division.

Mr Sterling: Can you explain that again? I did not follow.

Mr Polsinelli: They start the action in the general division but the individual has the option of referring the case to the small claims court. So the corporation would have to start the action at the general division, but if it is less than \$1,000, the individual being sued can ask that that case be transferred to the small claims court.

Ms Coulombe: Yes.

Mr Sterling: The mediation service that you have set up sounds very interesting, more interesting to me in terms of the appearance of justice to both sides, and that by sitting down

there is time to explain what is happening and that kind of thing.

I do not know whether it would be faster or more efficient. I sort of take from your statistics that there is not that much time gained or saved as a result of this process. Is that a fair evaluation? I mean, most judges are lawyers. You are replacing the judge-lawyer with a lawyer who sits in a room and undergoes another process that is costly as well, and I presume the state pays for that.

Ms Coulombe: I am not sure. Maybe I should take the—

Mr Sterling: Maybe I am not being direct enough.

The Chair: No, actually I do not understand either. I might say that we do have a simultaneous translation system in operation now, and if we care to, we can use that.

Mr Sterling: No, I think it is more my fault.

Ms Coulombe: I will take the translation service. I want you to understand what I am saying.

Mr Sterling: I should have been more direct with you. My question is, do you believe that by using the mediation system, that deals with the case any faster than it would be dealt with by the small claims court? Do you think it speeds up the process?

Mme Coulombe: Le processus en soi est peut-être plus lent parce qu'une médiation dure environ...

Interjection.

Mme Coulombe: Il n'a pas de truc.

Mr Cureatz: I have to get one for him now.

Ms Coulombe: I will begin in English. Maybe it is longer because an interview is one hour. Before a judge it is about 20 minutes.

Mr Sterling: I understand the department of justice, the province, pays for the mediator. Is that correct? They pay all those costs.

Mme Coulombe: Oui.

Mr Sterling: Those are the questions I had.

Mr D. W. Smith: I have to speak in English. Your English is a lot better than my French. You said it does cost the government something. What does it cost the government, the amount of dollars that the provincial government puts into this program, roughly?

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Mme Coulombe: Je n'ai pas de chiffres pour la bonne raison que ça fait un certain temps que... Il y a eu une étude qui a été faite il y a au moins

quatre ou cinq ans qui disait que, en réalité, une cause qui passe devant un médiateur coûtait quelque chose comme — il faut que je me rappelle, c'est parce que je ne suis pas certaine des chiffres — mettons 28 \$, par exemple. Une cause qui allait devant le juge en coûtait probablement 200 \$.

Par contre, une cause qui ne se réglait pas devant le médiateur et qui allait à la fois devant le médiateur et devant le juge, bien là, évidemment, elle en coûtait 228 \$; elle coûtait donc un peu plus cher. Mais la cause devant le médiateur coûte moins cher parce que le médiateur coûte moins cher, ses secrétaires coûtent moins cher et ses locaux. Il n'y a pas de salles de cour, il n'y a pas de greffier. Il y a peu de saisies-exécutions parce que les saisies, suite au jugement des petites créances, sont faites par le gouvernement lui-même. C'est le message; il sait pourquoi il paie.

Alors, il n'y en a pas avec la médiation. Mais l'étude de coûts date quand même d'un certain temps et je ne suis pas capable de vous donner d'autres chiffres que ceux que je viens de vous donner.

Mr D. W. Smith: Have you ever thought of going to higher than \$1,000 in the small claims court, like going to, say, \$5,000 or \$10,000 because of things—inflation has caused so many increases. Have you ever thought of going higher than just the \$1,000 claims?

Mme Coulombe: Il y a un comité qui y pense, justement. C'est-à-dire que le ministère de la Justice a créé un comité pour étudier différentes formes d'accès à la justice. Entre autres choses, il regarde la possibilité d'augmenter la juridiction des petites créances, d'étendre la médiation ou encore de faciliter l'aide juridique. Mais le comité n'a pas encore rendu son rapport au ministère de la Justice, alors je ne sais pas quand une décision sera prise.

Mr D. W. Smith: Merci.

The Chair: I have a couple of questions and then Mr Cureatz has several questions. First of all, what is the level of acceptance by the public to mediation as opposed to going to the actual court before a judge?

Mme Coulombe: Cela n'enlève pas au public le droit de s'adresser au juge, alors le public apprécie beaucoup cela. Enfin, d'après le sondage qu'on a fait et d'après les commentaires qu'on reçoit, le public a toujours apprécié pouvoir avoir affaire à un médiateur tant qu'il garde son droit à avoir un juge et tant qu'on ne le force pas non plus à aller en médiation.

The Chair: As a result of the success in the small claims court, is there any movement either by the public or persons responsible for the administration of the courts to extend the mediation service beyond the small claims court?

Mme Coulombe: Il y a déjà des services de médiation un peu, en fait, en matière familiale. Mais maintenant, quant à l'étendre ailleurs en matière civile, pour l'instant le Ministère n'a pas de position là-dessus et justement le comité dont je vous parlais tout à l'heure étudie, entre autres choses, ça. Par contre, ça se développe aussi dans le secteur privé. Il y a des avocats de pratique privée qui font de la médiation. Ils ont commencé en matière familiale, mais ils l'étendent maintenant en matière commerciale, notamment pour régler les problèmes de leurs clients. Cela fait de gros dossiers.

The Chair: Does it seem to be a growing phenomenon in Quebec, in the commercial area, in the family area as well as other areas?

Mme Coulombe: Oui, oui. Je crois que oui, certainement.

Mr Cureatz: Is there any cost to the plaintiff and defendant to use the system? Does it cost money to file?

Mme Coulombe: Pas beaucoup. C'est 15 \$ pour une plainte de 250 \$ et moins et 25 \$ pour 250 \$ et plus. Alors, ce n'est pas tellement cher. S'il y a un jugement rendu et que le défendeur n'exécute pas le jugement, ne paie pas, il devra payer les frais de huissier. Mais il reste que c'est quand même le ministère de la Justice, ses employés qui vont procéder à la saisie. Alors, ça ne coûte pas cher aux gens.

Mr Cureatz: Mr Sterling was concerned about that area. I am interested—you had indicated at the beginning of your presentation about the figures, the statistics that are attached to the documents. I was just saying to my two colleagues that in the area I represent, the Oshawa-Bowmanville area, which is east of Toronto, it seems that I have had a lot of dealings with a relatively new system that has been started by the government.

I do not know if my colleagues across the way have encountered this, but it deals with maintenance support orders where, if an individual is separated and has an order that the spouse has to provide maintenance but the spouse is not providing maintenance in terms of money for support, the individual can go to this maintenance support organization, out of the Attorney General's office, which will track down the defaulting spouse and try to get the money.

But my encounter with the organization is generally frustration. I have never found them either overly co-operative or helpful for those who are seeking their help, or I have had complaints from the people who have been approached to make up their maintenance payments that there certainly is not a conciliatory approach, no helpful approach on making the maintenance payments.

That goes back to my statistics because when I get that kind of feedback from people using the service, one of my political reactions is that the people who are in the service, who are doing the work, are trying to build up a base so that they can report back to the Attorney General, "We have handled so many cases and our success rate is X per cent," probably trying to get it a higher per cent than a lower per cent to justify their existence.

Now that is my experience with that organization. I am looking at your statistics here under "Mediation accepted by applicant." I guess that is the plaintiff applicant, the person complaining. Are they happy with it? Is that what that means, 68.8 per cent mediation accepted? Do you mean accepted by the applicant, that is, he was happy with what he received? I am looking at your statistics—let's go to 1989, the fourth column.

Mme Coulombe : Oui, oui. Enfin, je comprends.

Mr Cureatz : In Hull, 96.5 per cent. Does that mean 96.5 per cent of the people who made application were happy with the results?

Mme Coulombe : Non.

Mr Cureatz : No. I got it wrong? Okay.

Mme Coulombe : Non. C'est simplement le pourcentage de requérants qui ont accepté de recourir au service de médiation. Ce n'est pas leur taux de satisfaction, c'est simplement ceux qui ont accepté. On regarde le nombre de gens qui ont accepté quand le greffier leur a proposé... Bon, à Hull, c'est probablement parce qu'on fait une sélection des dossiers qu'on offre. J'ai l'impression que c'est à cause de ça.

Voyez-vous, à Hull, il y a 1267 dossiers d'ouverts mais la médiation n'a été offerte que dans 670 dossiers. Alors, on a probablement trié un peu les requérants. C'est aussi que dans une grande majorité des requérants aux petites créances ce sont des honoraires, et ces gens-là ne rencontrent pas de greffiers. Ils ne vont pas en médiation. Alors, non, ça ne représente pas ça. Tout ça c'est simplement le nombre de gens qui ont accepté d'y aller. En tout et pour tout, les dossiers qui vont au service de médiation ne

représentent malheureusement qu'à peu près dix, quinze pour cent de tous les dossiers des petites créances. Finalement, ce n'est pas un très grand nombre parce qu'une fois que le requérant a accepté, il faut que l'intimé accepte. Déjà, il y a bien des intimés qui ne contestent pas la cause. Ils ne viennent même pas au service de médiation.

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Le taux de satisfaction : la seule chose qu'on a, c'est un sondage qu'on a fait. J'avoue que j'étais moi-même assez surprise de voir que les gens étaient généralement bien contents, parce que les gens ont peur d'aller devant le juge. Aux petites créances, du moins chez nous, ils n'ont pas d'avocat pour les représenter, donc ils ne se sentent pas tellement à l'aise tandis que quand ils viennent dans un service de médiation, là ils sont assis et ils peuvent expliquer leur truc sans être interrompus par un juge qui va leur dire : « Non, non. Allez droit au but. Non, je ne veux pas savoir ça. » Alors, c'est pour ça qu'ils aiment ça.

Mr Cureatz : Back to the percentage, though, I am not clear. Is there a percentage figure, just looking at Hull, of people who were happy with the service? I am not clear on the percentage figures again. For instance, in aid of translation, back to the 96.5 per cent across Hull, now that means 96.5 per cent of the people accepted the mediation, but it does not mean that they were happy with it. Is that correct?

Mme Coulombe : Oui, parce que premièrement, de ces 96 pour cent qui ont accepté, il y en a peut-être la moitié seulement qui sont venus parce que l'autre partie n'a pas accepté ou n'a même pas répondu. De ces gens-là qui ont accepté et qui sont venus, est-ce qu'ils ont tous été contents ? Non, certainement pas. Mais de façon générale, enfin, comme je vous dis, avec le sondage qu'on a fait, ils semblent avoir été contents de façon plutôt majoritaire, même des fois quand leur cause n'était pas réglée, parce qu'au moins ils savaient quoi faire devant le juge. Dans le fond, c'était une consultation juridique gratuite aussi pour eux.

Mr Polsinelli : Eighty per cent are happy, page 3, bottom paragraph.

Mr Cureatz : You mean in her presentation?

Mr Polsinelli : Yes.

Mr Cureatz : All right. How about the unhappy ones?

Mr Polsinelli : Twenty per cent.

Mr Cureatz : Let's match that up. I like listening to her much better than to you, if you

have not noticed. I have to go adjust her translation thing in a minute. I have a serious question.

The Chair: Mr Cureatz, you will be happy to know that the parliamentary assistant to the Attorney General does know how to read.

Mr Cureatz: I know he is a Liberal and I thought for a moment that he did not. One final question, if I might. Following across from Hull, mediation accepted by respondent: 30.3 per cent. Now that means of the respondents who showed up, 30.3 per cent accepted the mediation.

Mme Coulombe: Des intimés à qui ça a été offert, oui, c'est ça. L'intimé qui a reçu une procédure s'est vu offrir le service de médiation par un papier; il a reçu une procédure et il a reçu un papier dans lequel on lui a demandé — Alors, il y a 30, 35, 40 pour cent de ces intimés-là qui ont accepté. Il y a quand même des intimés qui sont souvent les mêmes, par exemple, des compagnies de voyage, de grosses compagnies comme, je ne sais pas, Eaton et des compagnies d'assurance. Ils reviennent. Pas toujours, ça peut dépendre des causes mais, je veux dire, ils vont revenir parce qu'ils aiment mieux, bon, ils peuvent éventuellement garder leurs clients.

Mr McGuinty: On a matter of language, maybe the interpreter could help me. Mr Cureatz told me that "pas de deux" means "father of twins." Is that correct? Comprenez-vous?

Mr Cureatz: I will take the witness out for dinner tonight and we will discuss it further.

Mr McGuinty: I could give you another phrase that I could not raise in mixed company.

Mr Sterling: What hours of service does the mediation and the small claims court offer to the public? I would be interested to know that, if you are aware.

Mme Coulombe: C'est une bonne question. Malheureusement, je dois dire que les heures de bureau sont comme les heures de bureau, c'est-à-dire de neuf heures à cinq heures. On a déjà proposé d'ouvrir le soir, enfin jusqu'à sept heures ou huit heures, mais ça coûte cher d'ouvrir le palais de justice et de payer les employés, entre autres, ceux qui vont avec les juges: les greffiers, les huissiers, etc. Cela coûte cher et c'est pour ça que ce n'est offert que pendant les heures de bureau. Enfin, disons que c'est la raison officielle, il y en a peut-être d'autres, mais pour l'instant non, ce n'est pas le cas.

Mr Sterling: The only thing, and I do not think perhaps this witness can help us, is in terms of actually what happens in the courtroom. How

the process is run within small claims court is of some interest to me. I do not know whether the witness could suggest someone else who might be able to help us in that manner.

The Chair: Perhaps to the extent that she can, she might indicate to us what the actual procedure is for small claims court in the absence of mediation service.

Mme Coulombe: Oui. C'est très simple. Le requérant va faire sa requête, si on veut. La requête est envoyée par le ministère de la Justice à l'intimé, avec ou sans médiation. Cela passe ou non à la médiation; ça s'en va, après, devant le juge. Alors, les parties sont convoquées par le ministère de la Justice à peu près cinq semaines avant la date d'audition. S'ils ont des témoins à amener, ils donnent leur nom et adresse au ministère de la Justice qui enverra les subpoenas pour les témoins et ils se présentent à l'heure dite devant le juge, tout simplement, avec leurs témoins et ils expliquent leur cause. Dans le fond, c'est comme ça que ça marche.

Mr Sterling: Have you sat through some cases in the small claims court? Does the judge do all the questioning? The person who is trying to make the case, the plaintiff, as we call him here, does he or she have to carry the case or prove the case or does the judge ask all of the relevant questions?

Mme Coulombe: Je n'ai pas assisté à suffisamment de causes et c'est pour ça que je ne voudrais pas vous induire en erreur, mais ça dépend des juges. Il y a des juges qui laissent les gens parler, expliquer chacun leur truc et il y en a qui sont plus directifs, qui vont poser plus de questions. Mais, d'une façon générale, il faut que les gens aient quand même un minimum de preuves pour démontrer leur cas.

Si, par exemple, la personne se plaint de ce que son auto a été mal réparée, de préférence il va falloir qu'elle ait un expert avec elle pour confirmer ses dires. Sans ça, peu importe le juge, sa cause pourrait être rejetée. Donc, ça dépend des juges mais il y a quand même un minimum de preuves à respecter devant les petites créances, mais ils sont un peu moins exigeants possiblement parce que les gens n'ont pas d'avocat.

The Chair: If there are no further questions, on behalf of the members of the committee, I want to thank Ms Coulombe for coming here, presenting her brief and responding to our questions. I think they will be very helpful to us when we are preparing our final report to the Legislature. Thank you very much, Ms Coulombe.

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Our next witness will be Martin Campbell of the law firm of Beard and Winter of Toronto. Mr Campbell was previously with the Ministry of Health and also previously on the staff of the Macaulay report on government agencies, boards and commissions. Mr Campbell, as soon as you set up, we can hear your brief and, presumably, we will have some questions from members of the committee.

Miss Nicholas: You are still on the staff, are you not?

Mr Campbell: Not any more.

Miss Nicholas: It says staff lawyer.

Mr Campbell: I believe the agenda is not quite accurate. I was with Mr Macaulay, but the report was completed in September of last year. I later on went into private practice.

The Chair: Mr Campbell, any time you want to start, go right ahead.

MARTIN CAMPBELL

Mr Campbell: As Miss Nicholas pointed out, I am listed in the proposed schedule of hearings as the staff lawyer with the Robert Macaulay review of regulatory agencies. As I said earlier, as you all know, the report was released in September, of 1989 and Mr Macaulay's work on the report was completed. I have since left the Ministry of the Attorney General and have had no connection with the Macaulay report since then. But I have been asked to attend before this committee, I trust, not to defend the Macaulay report in any way or to speak for Mr Macaulay.

I gathered from Mr Fenson that it was necessary to give you some information on some of the research that went into the Macaulay report and, in particular, on alternative dispute resolution in the context of agencies, boards and commissions, and it is in that capacity that I am here before you. I am not representing any group or interest, and I have no ongoing connection with government.

I should add that the focus of the Macaulay report was agencies, boards and commissions. We were not specifically looking at ADR. If you may recall, Miss Nicholas, Mr Macaulay's mandate was a very broad one. He spoke with you, if I remember correctly, on the role of the Ombudsman in your standing committee on the Ombudsman. ADR was not a major component of Mr Macaulay's study.

For ease of comprehension, I guess everyone uses the words ADR, but in the Macaulay report you may come across the use of the letters ABC,

and when I say that I mean agencies, boards and commissions. So that will be, in effect, my shorthand for that purpose.

If I may, I would like to make a preliminary observation, which is: In one sense the development of agencies, boards and commissions can be viewed as an early attempt at ADR. That is to say, the Legislature, in creating agencies, boards and commissions, wished to provide a forum for the resolution of certain types of disputes that did not necessarily lend themselves to resolution in the court setting. Many agencies were created for the specific purpose of avoiding the formalism, cost, delay and the lack of what might be called specialized knowledge of the courts. So in one sense ADR got a start, we could say, in the administrative law context with the creation of ABCs.

I now would like to refer to the Macaulay report. I think at the outset there are two points which should be emphasized. It covers a wide range of issues and it covers a wide range of ABCs. If you will just look at the table of contents, for example, at the chapter headings alone: "Agencies—A Definition"; "Differences Between Agencies and Courts"; "McRuer and All That—From Dicey to Today"; "Areas of Concern for Agencies"; "The Agencies and the Ombudsman"; "The Recovery of Agency Hearing Costs"; "Needed Structural Changes"; "Increased Statutory Powers," and so on, it will give you an idea of the scope of the report.

Second, if you also look into, I believe, chapter 2, there is a great long list of all the agencies that were looked at in at least one form or another. So a consequence for the purpose of the Macaulay report was this: it was quickly realized that a detailed study of each ABC was impossible in the one-year time frame that we had. On the other hand it was possible to make some general statements, so you have to consider Macaulay's two broad recommendations in this light.

There is a general recommendation that agencies be given broader powers and second, that an administrative council be created to assist in the implementation of ways to improve the operation of agencies on a case-by-case, agency-by-agency basis. So there is a blend of the general and the particular, and that is something which I think has to be borne in mind when you consider ADR in the ABC setting.

Specifically, the references to ADR in the report appear in chapter 9 at page 9-15. In that, Macaulay recognized the need for a wide range of powers. For example, the subheadings there

are: "The Prehearing Conference," 9.6.1; "The Settlement Conference," 9.6.2; and "Mediation and Conciliation Services" for 9.6.3, and so on.

Then if you look at chapter 8, which deals with the creation of the administrative council, you will see on page 8-156 that among the powers and duty of the council would be to make recommendations to the chairs of agencies "respecting ways to make mediation and conciliation services and settlement conferences more available to parties in proceedings" and so on. So this was addressed to some extent by Mr Macaulay.

In a sense Macaulay clearly recognized the need for agencies, boards and commissions to be able to resolve disputes in new ways, but because of the diversity of agencies, the changes and so on, it would be best implemented through a specialized council.

There is one other other feature of the Macaulay report that I think should be underlined and that is the concept of the public interest. This is something that is unique to the administrative setting in that in courts often you deal with individuals having disputes with other individuals, but in the agency, board and commission setting you find that the public interest is a major component.

Another feature that Macaulay makes quite clear is that there is a vast difference between agencies and the courts. Agencies do not do the same things that courts do. The key difference, again, is that agencies are given the responsibility of considering the public interest in very direct ways and I will elaborate on this a little bit later on. I would like to give you a little bit more on the background of the specific recommendations that Macaulay made. In all of our research, Macaulay liked to get back to first principles, so you see in chapter 4 that the concept of balancing individual interests and state interests and the overall public interest emerges and this was one of the key principles underlying the report. His view was that there needed to be greater powers to enable agencies, boards and commissions to find the proper balance point.

Among the powers we looked at, of course, was ADR, and we tried to look at ADR as one of the new ways by which one can go about determining the balance point between various interests. We tried to look at the components of ADR and in this I may repeat some of the material which you have heard from other speakers, but I trust that there will be something of value.

First we have to consider the nature of the players participating. Usually in the court setting

individuals deal with individuals. In the administrative law setting the relationship is often between the individual and the state, with the public interest involved. Second, we have to consider the range of dispute-resolving mechanisms available from the point of view of avoiding or fleeing from some form of dispute to a negotiated settlement by the parties themselves to ranges that increase the order or the magnitude of third-party involvement. So, in sort of reverse order, you have conciliation, convening, facilitating, mediation, mini-trials, fact-finding, mediation-arbitration, arbitration and finally court-imposed decisions. So there is quite a range there, which I am sure you have heard from other speakers.

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Third, you can examine ADR in two distinct settings. One is in the process aspect of this. One can use ADR as a way of facilitating the process. The other is, of course, in the actual resolution of the dispute. We also have to consider what we are trying to accomplish with ADR. Is it a question of cost reduction, in which case we are looking at perhaps a couple of types of costs: the cost of the process itself and you have to consider the cost of not disputing something, the opportunity cost that is lost? It is important to understand that you are going to get costs of one sort or another in all forms of litigation or dispute resolution, whether it be fees and disbursements to counsel or to experts or the loss of wages if you have to participate between nine and five, or whatever, and so on. So you want to look at a level of cost that is sort of commensurate with the value or the interest at stake. Again, that is relative because, for example, the Ontario Waste Management Corp will spend millions of dollars down in the Niagara Peninsula but that is a small proportion of its overall revenue and the assets available to it. But an increase of a few dollars in a welfare payment is of substantial magnitude to the recipient of that. So you have to look at costs in a relative sense.

Similarly with delay: some delay is going to be inevitable, but again, the delay should not be out of proportion to the interests at stake. If you have a personal injury you may want to have a year go by before you resolve the issue: you want to see the extent of the injuries. On the other hand, if you need a child support payment, you want that quickly.

Similarly with the formality of proceedings and range of circumstances, sometimes formal rules and procedures can be manipulated by a party for his own purposes. But more often than

not, some process, some formality, is necessary to protect rights. For example, in the SPPA, that is the Statutory Powers Procedure Act, where reputation of character is at issue, particulars have to be filed beforehand.

Another element is the acceptability of the result. You have to consider whether an imposed result is going to be better accepted than a negotiated result. So these are some of the elements that go into ADR and apply in the administrative law setting.

We also identified a number of traps or pitfalls or caveats that I think you have to consider in looking at ADR in the ABC setting. First, you should not use ADR merely to solve a problem that has to do with cost or delay or formalism if the real problem is the better way to resolve disputes. In other words, do not look to ADR to solve problems that can be solved in other ways.

Second, I think it was important that we notice this: to stay away from wide-sweeping recommendations that would impose a particular dispute-resolving mechanism across the board for all agencies. You have to look at each agency, the particular functions it performs and the particular interests that commonly appear before those agencies.

Third, it is critical to remember that there are very real differences between agencies and courts. If you are interested in a list of some of those differences, Macaulay identified 24 of them, and they are in chapter 3 of his report.

Fourth, we found that there was not much available in Canada on ADR in the administrative agency setting. There is a bit more information in the United States, and the material I passed out earlier refers to that, and I will go through that a little later on. But it is important to remember that you must use the US material with great caution. As you know, of course, the US Constitution is based on checks and balances and a split between the executive and legislative branches. So the agencies are set up in a different constitutional framework. US federal agencies are governed by usually specific statutes that create them, and they set out in those statutes and in their procedural statutes rules that our common law takes virtually for granted.

Last, a lot of American case law has elements to it that are peculiar to its constitutional setting. So the final result of these thoughts was that as long as we are aware of the various elements of ADR and we avoid these traps, ADR in the agency setting seems to be a desirable policy objective. What we really lack at this stage, and certainly in a policy sense, is data: getting from

agencies that now have in place some form of ADR some assessment as to whether or not their results are better by using the ADR mechanisms than they would be without ADR. We do not have an awful lot of data on that. When I say "better" I mean better in the sense of appropriate cost, appropriate delay and so on.

The Law Reform Commission of Canada—I believe this appears in your background material—has done some study of this, and I believe its recommendation was that there should be some studies. I am pointing out appendix E, I believe, of the background paper, which suggests that in the federal setting some study is required to see what has emerged with respect to the federal agencies.

The material that I put before you is an extract from the Recommendations and Reports of the Administrative Conference of the United States, 1986. The Administrative Conference is an agency. The chair is appointed by the President of the United States. It is empowered to assist federal agencies, boards and commissions in implementing rule changes and so on. Its organizational structure is somewhat complicated, but it has a small staff of a dozen or so lawyers who come up with recommendations and papers on procedural and other matters.

There are two other councils in the world that are somewhat analogous. The Council on Tribunals of the United Kingdom and the Administrative Review Council of Australia. These councils are not quite as advanced as the United States is in terms of ADR.

The Macaulay report recommends the creation in Ontario of a council that takes the best of these three that we looked at.

So, if I may, I might just point to some of the features of this document. On page 9 right at the top there is a recognition by the US conference that "The formality, costs and delays incurred in administrative proceedings have steadily increased." In the next paragraph they say that an immediate step to try to resolve this "is for agencies to adopt alternative means of dispute resolution." They make some general recommendations on page 10, part A, "General." In paragraph 1, the first three lines, they say, in effect, that "Administrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods discussed in this recommendation for resolving a broad range of issues."

Over on the next page, they set out some of the procedures that should go into an ADR program. Then, on page 12, they try to identify some of the

features that would go into agency use of arbitration, and they list some criteria there, where arbitration is likely to be appropriate and where arbitration is likely to be inappropriate. So you look at the overall result you want to obtain, and say, "What is the best device for getting to the best result?"

On page 13, there is reference to mandatory arbitration, settlement techniques and so on. There are additional backup papers that I would be prepared to make available to Mr Fenson and his staff at a later date, but I thought this might be of use for proceedings today.

If we look at the US experience as far as it goes and apply it in Ontario, we can look at perhaps three types of agencies, boards and commissions. You can look at those that perform, broadly speaking, an adjudicative function; you can look at those that perform, broadly speaking, a regulatory or legislative function; and third, you can look at those that perform an administrative or almost executive function. When I say "these functions," I do not want to get locked into definitions in this way, because many boards will perform all of these functions at one and the same time and of course with a particular proceeding, and the function approach does not help a great deal. But I think it gives you some idea of the sorts of places where ADR can be used.

If you look at a board where an adjudicative function is performed, then you may find some scope for ADR. For example, if you look at the Nursing Homes Review Board or the Commercial Registration Appeal Tribunal, these tribunals review decisions taken by licensing authorities that either review or propose to revoke licences. You are dealing with the direct economic interests of licensees.

In this case, the individual is dealing directly with a licensing authority. Issues of credibility and competence are likely to be raised. The issue at stake for one of the parties will be the right to continue in business. It is highly unlikely that you can mediate or arbitrate a matter of that sort. A board will have to assess credibility. However, you might, in that circumstance, have some agreement or settlement with respect to process. The parties might agree that certain documents would be admitted, certain facts admitted and so on. So that is one way in which in Ontario the ADR could be looked at and perhaps considered.

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A second group of boards, the group of boards which perform regulatory or legislative functions are, for example, the Ontario Energy Board or a joint board under the Ontario Municipal Board

and the Environmental Assessment Board legislation which can bring together these boards. Here these boards customarily perform a regulatory or virtually a legislative function. They determine large issues of policy. The difference there, of course, is that there may be many, many parties which appear before these boards, but the boards are not necessarily bound to follow the position of any one of those parties. They may choose a result which is quite different from that intended by all of the parties. In the public interest, if they decide that there is going to be such and such a rate, that rate may be quite different from the rate proposed by, let's say, Hydro or anyone else. So here you may have mediation or arbitration of some form, but the board has to maintain a final say on the outcome. It cannot be left to the parties alone to make a decision.

Macaulay dealt with this in part in chapter 9, at pages 918 and 921, where, if conciliation is awkward and the parties on such a board go through a process of conciliation, then any result can only be an interim result, and the board itself would have to examine the result reached by the parties and determine whether or not it is in fact, in their view, in the public interest. And so in that way there is a mechanism to get the best of both worlds, to maintain board control over the result, but allowing the parties to attempt to get to the result as far as they can.

The third group of boards are the sorts which perform a more administrative or executive function. For example, the Human Rights Commission in effect enforces legislation which attempts to eliminate discrimination. In the legislation you will find there is reference to conciliation or settlements. Certainly in the federal legislation there is specific reference to conciliation. It seems to me that that is an ideal place for ADR because there what you want is to perform an education function, in effect, to perhaps show the parties involved in the dispute why a certain course of action is inappropriate. And so that is a mechanism which can be well used. It is also an area where there may well be some data which can be pursued.

One area which I think, in retrospect, we might have given more attention to was the area of imposing some form of mandatory arbitration. The Macaulay report did not deal with this extensively and I think in retrospect it is something we should have touched on. The only reason for that is that there was a great mass of material to get through and we did not have enough time perhaps to deal with that adequate-

ly. And also, to some extent mandatory arbitration is a feature primarily that the labour law boards and the labour courts and so on—and I gather you will be hearing experts in that area, so I do not perhaps need to get into that to any great extent. But I think, in retrospect, that is an area which should be canvassed more in the agency, board and commission setting.

So, in conclusion, I think it is clear, and my colleague's report identifies this, that there is a need for a better, wider range of dispute-resolving mechanisms which can be made available to agencies, boards and commissions. Second, because of the diverse nature of ABCs, any dispute-resolving mechanism should be implemented very, very carefully, with particular attention paid to the needs of individual ABCs and the needs of individual features of their work. There may be various functions performed by an individual agency and you have to look at ADR in each setting. Perhaps an administrative council would be the best to oversee that type of implementation. The major component which requires special interest in the ABC setting is, of course, the public interest. This takes you away from the court-based ADR models.

Those are basically the opening remarks and I would be pleased to try to answer any questions you have on this.

The Chair: I have a couple of questions myself and I have just noted that Mr Sterling has some questions. In your opening remarks you had indicated that agencies, boards and commissions, the ABCs, were an original attempt at or form of alternate dispute resolution. It appears that perhaps they have become very structured and formalized, and now we are into a new cycle where you need some new ADR within what was originally supposed to be ADR.

That leads me to a recommendation that was made this morning by Gordon Henderson. He was suggesting that there be a legislated framework for ADR, which would include self-governing bodies, such as the Law Society of Upper Canada or the College of Physicians and Surgeons of Ontario, and monitoring credentials and presumably licensing and so on and so forth. Do you think there is a risk in the whole area of ADR that we could get too formal and too refined so that it defeats the very purpose of alternate dispute resolution? In fact, has that happened with agencies, boards and commissions?

Mr Campbell: I think one of the thrusts of the Macaulay report was trying to point out the very danger that you have defined and that was the overjudicialization of ABCs and the tendency of

courts to be critical of ABCs unless they acted like courts. One of the main objections that Mr Macaulay has to the present system was just that point, that they are becoming overly formalized.

If I can perhaps be mildly facetious, I think any time you introduce lawyers to judicial processes there is an almost inevitable sense that things become judicialized and process perhaps takes priority over the final results. I think there is inevitability of that, that it will just attach itself to whatever mechanism is chosen. I think the primary line of defence against this sort of tendency is in the chairs of the various ABCs or the mediators who are appointed, to try to find the right balance between proper procedure, which protects parties, at the same time not allowing a process to become overly formalized. I think certainly there is a danger that it could happen with the ABCs in about 20 years.

The Chair: Yes. I would like also to refer to a recommendation that was made yesterday by Professor Paul Emond from Osgoode Hall Law School. He was particularly concerned about the Environmental Assessment Board, which requires that the board deliberate on issues and there is in effect a prohibition against settlement of matters which are referred to the board. I am looking at the recommendation you just referred to, the proposed amendment to the Statutory Powers Procedure Act, the power to hold settlement conferences.

First of all, would you concur with Professor Emond? And second, how widespread is that type of provision that exists in the Environmental Assessment Act that in effect negates the possibility of ADR?

Mr Campbell: I would be very hesitant to comment on the EAB because it is, again, a very sophisticated board and you have to study the context and the manner in which the board and its counsel and so on in fact interpret their law. I can perhaps try to speak generally.

If the prohibition you speak of is an attempt to ensure that certain issues are in fact addressed and not settled by parties and if those issues are indeed issues that should be in the public domain, then clearly it would be appropriate to prohibit parties from settling quietly in a backroom somewhere issues which really should be in the public forum. If that is the type of thing which the statute is designed to prohibit, then I would think that is a wise provision.

If, on the other hand, you are dealing with a situation where it is proper and appropriate that two individuals have a particular interest which does not affect the public, there should be no bar

to them making an appropriate settlement of that if they feel so inclined, but again, I have to draw a distinction between a conference which is designed perhaps to facilitate the process and a conference which is designed to bring about a result.

It may well be useful for counsel—and for example, the Ontario Waste Management Corp hearings counsel had met informally—to try to find out ways to narrow the issues, get agreement on facts, scope the proceedings, in effect. This is perfectly appropriate for counsel to try to do that, to make sure that the processor proceeds efficiently. It would be inappropriate for counsel itself to settle a case and announce to the board that this is what it has done. That is not going to happen in that sort of case.

So I think there are several types of forums in which that form of settlement can take place.

Mr Sterling: I am extremely interested in your presentation today, Mr Campbell. I am the newly appointed chairman of the standing committee on government agencies of this Legislature and have had an opportunity to read some of Mr Macaulay's remarks. I guess the wish of this committee would be almost to be able to *carte blanche* recommend an ADR mechanism or a number of mechanisms that would work in each and every case, and what you are telling us, I guess, is that in each and every case, when dealing with ABCs, the goals are so different that you have to look at each one in order to come to a different conclusion.

Did you in your report or in Macaulay's report, and I cannot recall, list all of the ABCs that use, or might have use for, an ADR mechanism?

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Mr Campbell: As I said at the outset, the major focus of the Macaulay report is on structure and powers and we did not really look at ADR as a major area.

Mr Sterling: Yes.

Mr Campbell: It was almost a byproduct which appeared in a long list of things that should be added to the range of powers.

Mr Sterling: This council which Macaulay recommends to be set up, and I am not sure what he calls it, what was the wording?

Mr Campbell: The administrative council; the Ontario Council of Administrative Agencies.

Mr Sterling: Yes. Now what was their function to be? How did he see that function?

Mr Campbell: The function was first not to be another level of government and not to be another level of appeal. It was not considered to be a form

of tribunal, which would in effect oversee and act as an appellate body. It was perceived to be something almost in the nature of a secretariat or research base or resource base, so that chairs of various agencies could go to a central body or group that had specialized knowledge in administrative law, how to organize case management, how to organize their work and get assistance in dealing with problems which were unique to them or particular problems in their area. It would also provide library services, translation services, co-ordinate the use of rooms and just get better economies of scale.

It would perhaps make recommendations on rules and procedures, and to that end the council would have some judges, administrators and so on, on it so that they could give advice. We contemplated the creation of a small staff of people who would rapidly develop expertise in the area of administrative agencies. The model was not quite a model similar to that of the Australian appeal tribunals and so on where there is indeed an appeal route. It was much more a body which would be of assistance as a resource based.

Mr Sterling: I realize, as we get a more and more complex society, that people are predicting that there are going to be more ABCs of all natures to handle decisions which were formerly made in rooms like this. As an elected member, I guess I have sort of an inborn reluctance to give that up.

One of the things I am wrestling with in terms of the committee on ABCs is whether in fact we are relevant at all in terms of the reports that that committee has produced over the last 10 or 12 years because, ironically, I was involved with the old standing committee on procedural affairs, which this particular committee spun out of, but I go back 12 years and I look at some of the reports then and wonder whether or not anything is happening or whether it is just a matter of the ABCs' opportunity to come in, buffalo the members and ask for more jurisdiction and money and go on their merry way.

But I am very much interested in your remarks on the ADR. Maybe, if I could, and one thing this committee might want to consider is to suggest that when the other committee, the agencies, boards and commissions committee sits, one of the things it does is get some advice when reviewing an agency, board or commission that deals with resolving disputes, get some advice as to whether or not the existing process makes sense in terms of the different factors which Mr Campbell has mentioned to us here today.

Mr Campbell: Could I perhaps maybe comment on that?

The Chair: I was going to comment and then I thought perhaps, Mr Sterling, that you would be a good link towards ensuring that that happens in the sense that I anticipate, in our report to the Legislature, that we no doubt will be making some specific recommendations as well as general policy directives. It is certainly within our purview to make recommendations to the Legislature that would include the power to hold settlement conference recommendations of the Macaulay report. I think, as chairperson of the other committee, that you could probably make that linkage, perhaps file a copy of our report with your committee and perhaps include people such as Mr Campbell in the deliberations at the appropriate time. I think it is a very valid point that you are making and I think that that linkage has to be made.

Mr Campbell: If I may comment, I believe your committee on agencies, boards and commissions has jurisdiction over approximately 580 or perhaps more Ontario agencies, and I think Mr Macaulay pointed out that that is far too many for any one committee to study in any form of depth or in the course of a year. We found that we were looking at the 90 regulatory agencies and could barely touch the surface. I had occasion to study one agency in detail. It took me about six months to get a handle on what it was doing. We just clearly did not have the resources. Nor can a committee, I think, as Mr Macaulay points out, with limited resources, deal adequately with that many agencies.

One of his recommendations was that the review council could act as, in effect, a conduit or a facilitator so that it could put before a committee such as yours a group of boards having common problems. For example, the Nursing Home Review Board, the licensing review board, the Health Facilities Appeal Board all deal with licensing. So does the Commercial Registration Appeal Tribunal. There you could deal with four or five boards in a generic sense. From deliberations of that sort, then the mechanisms to improve the process, such as ADR, could be canvassed and in a sense scrutinized by committees, so that it is not just a question of the council itself that will be composed largely of staffers and bureaucrats, essentially, or members of the agency board or commission who may get into procedural formalism to too great an extent. A group such as this would then oversee it, canvass it and scrutinize just how ADR was

working out. So there could well be very useful results if that approach were taken.

Mr Cureatz: If I might, if Mr Sterling does not mind.

The Chair: Certainly, Mr Cureatz.

Mr Cureatz: Just a follow-up to the number of years of life in here also, I might add I have had the opportunity of sitting in on ABCs. It is frustrating from a member's point of view. You tear in for two hours, you try to get a feel about the presentation being made by the committee, the report is passed, they carry on and you wonder what you did. Of course, I know, now that we have this enlightened Liberal government they all know what they are doing, but I can say with some frankness that when we were the government I sometimes wondered. I know there is no doubt in Mr McGuinty's mind.

The Chair: Are you praising us or criticizing us?

Mr Cureatz: It is sort of backhanded criticism. However, the follow-up, what would be helpful, I think, Norm, is something to think about. Here we are a committee to study a committee, but there has got to be a better system to monitor those committees. I am just thinking, taking your idea about grouping them, the licensing aspect, one step further and saying, "Wait a minute, are you really doing anything, or can one be dropped and another board look at the whole thing?" There is certainly room in there to fix up those committees.

Mr Campbell: Certainly right now every single agency, board and commission has, in one way or another, a minister who is responsible to the House for the operations of that agency, board or commission, so that is one way in which the activities of an agency can be looked at. But the questions in the House, I think, with all respect to you, are not perhaps the best forum to canvass what is really going on in the committee.

Mr Cureatz: You are right.

Mr Campbell: So it seems to me the committee on agencies, boards and commissions could be a forum for canvassing these sorts of issues. The problem is that the committees themselves probably do not have sufficient staff to really get to the nitty-gritty, and even though hearings like this are public and are useful and you can have people before you, often it takes a lot of study to figure out what is going on. So the body that Mr Macaulay recommended, the council, could in effect do a preliminary screen and say, "Here are four or five areas that we think really need addressing, and let's go to the

committee and get some guidance on it and see what their thoughts are." I think that is the sort of thing that could come out of it, and certainly ADR could well be high on the list of priorities because of the need to ensure that it is not only justice being seen to be done and actually being done, but done well.

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The Chair: Perhaps I could add one follow-up question. I am basically asking for your personal advice or opinion on a particular issue. We have seen the courts attempt to force the parties into settlement. We have seen the advent of pre-trials and the whole process of trying to keep the parties out of court. My first question is, is there a structural bias against that generally in agencies, boards and commissions? Second, how high a priority should it be to introduce ADR into agencies, boards and commissions?

Mr Campbell: Perhaps I can just go back over the first part of your comments here, the reference to the courts forcing settlement. The courts are extremely costly and the process is extremely time-consuming, so the forcing is not in a sense deliberate, but is almost a byproduct of that process.

Second, there is an aspect in which the enforcement of a settlement or the encouragement to settle is valid. Most disputes can in fact be settled and very few need the outside imposed decision. The process should have a component, and the court process tends to have just by the extent of time it takes, ways and places in the process where settlement discussions can take place in an informal way.

The pre-trial conference is one structured part of that process, but from my days in private practice I recall well that after discoveries one normally sat down with opposing counsel and said, "Okay, what do we do?" That was the occasion for most of the settlement discussions, where the issue was basically not terribly much in doubt and an experienced counsel could predict with some certainty what was likely to happen. They would then go out and sell their clients.

Most of the time the settlement is in a sense encouraged by the wrong mechanism: It is too costly, too time-consuming. That is the sort of thing you would want to get rid of, but you would also want to encourage parts of the process where people settle for the right reasons, "We would rather settle it ourselves."

When you bring that into the agency, board and commission setting, you do not have anywhere near the same level of formalism prior to a decider sitting in. You have in effect counsel

who are aware that they have some sort of dispute going on, but often the first time they will formally be together will be the very first day of the hearing.

In my practice, when I was involved in acting for the Ministry of Health in licence revocation matters, where one would expect a relatively contentious day it was my practice to phone opposing counsel and discuss the issues and so on and so forth and in an informal way try to narrow the issues or in some cases even work out a deal. That deal would then be put before the board in the ordinary course. Many chairmen of boards will say, "Gentlemen, is there any way you can settle this matter?" and will invite counsel to discuss it.

While you do not have a formal decision track in the agency, board and commission setting, there are ways in which counsel can do it. It would clearly be an advantage to set out some form of pre-hearing conference. If a board could depute one of its members to convene a meeting of parties to see what issues could be canvassed, certainly that would be advantageous in many of these matters, but it does not need to be quite as formalized as the courts.

The Chair: Professor Emond yesterday was indicating, in a sense contrary to your comment, that in some of the agencies, boards and commissions, namely, the Environmental Assessment Board or perhaps the Ontario Municipal Board, the costs are absolutely exorbitant for the participants in terms of each hiring independent expert witnesses, planners, environmentalists, etc, and that it certainly would make more sense if there was a process to bring the parties, including representatives of the public—I would like your comments on how the public can be represented in the ADR context before agencies, boards and commissions as well. He indicated, for example, that if the parties could be brought together and could agree on the retention of common experts, so that you do not have two or three parties before an Ontario Municipal Board hearing hiring their own independent planners, environmentalists or what have you, that if the parties could get together, agree on who the technical experts can be and retain them, you are paying one consultant instead of three or four and the time period can be reduced, the cost can be significantly reduced and the adversarial nature of those things would be reduced as well.

Number one, do you think that is a relevant approach for those large types of expensive hearings, and generally does it make sense to

proceed on that basis with the public participating in some fashion?

Mr Campbell: Often in litigation it is a race between counsel to get to the best expert, and often if you can agree on the experts, you should probably be able to agree on the case itself, because often the expert is the one who determines it. If you have a major issue or a major matter, I think there will inevitably be a divergence of views among experts and the various parties will want to buy their own experts for that purpose. But certainly a board could, through cost penalties or through pre-hearing conferences attempt to narrow the use of experts, so that instead of having three experts and three experts, you can perhaps have one expert and one expert. There may be areas that are not in dispute and you can dispense with a range of experts.

I think most agencies, boards and commissions could be encouraged to get the parties together through either a case officer, a settlement officer or a conciliation officer, not necessarily to say, "We will determine a result," but to say, "How can we reach a result in the most economical and efficient way?"

With respect to the public component, at page 921 of Macaulay's report—I do not know if that is part of the extract I asked be to be sent about—there was a reference, and I could perhaps explain it very briefly, to mediation and conciliation where Macaulay recommends, "An agency may on its own initiative, or at the request of the parties...convene a meeting of the parties...to mediate or conciliate the issues."

The real problem here is, how do you get the public involved in that? Our view was that the agency itself in that context has to act for the public, at least in the initial stages and say, "The parties may have a view of this, but we ourselves have to keep in mind the public interest." Later on, what you want to do is encourage the parties to come to some sort of interim solution and then have the agency look at that solution. The agency may give interim confirmation to a proposed solution, but where it determines that in the public interest public hearings should be heard, then it should make that confirmation subject to whatever comes out of a public interest hearing.

The real problem with ADR in the ABC setting is plugging in the public interest at the right time and in the right way and that is quite different from the courts.

The Chair: At the present time, the province has the Intervenor Funding Project Act, and it establishes a panel and a process for determining an appropriate public intervenor or an intervenor

on behalf of the public or a particular public interest.

Mr Campbell: That is correct, yes.

The Chair: That deals with the funding side, but presumably that type of process could also be appropriate for a large hearing such as the Environmental Assessment Board or the Ontario Municipal Board, but just dealing with a group or an individual to represent a public interest.

Mr Campbell: I think the Intervenor Funding Project Act—correct me if I am wrong; I am speaking from memory—does have among the criteria the funding panel must consider in deciding whether or not to award funds, the extent to which a particular applicant for funds has put his mind to co-ordinating his efforts with others. Second, many boards have the power to award costs, as it were, after a decision has been reached and they can take into account whether or not a party has misused or employed far too many experts.

The Chair: That is in the act but my question is, quite apart from the funding component, the issue of the public being represented in mediation or conciliation of a major issue, would that type of process in determining who would represent a public interest, in your opinion, be an appropriate process?

Mr Campbell: It is tricky because each board will have its own particular constituency. We all get involved in, say, hydro rates in one form or another, but we are not involved in, say, licensing of motor vehicle dealers. So in one sense the public, which is concerned about, say, increased competition, too many licences, or who are really the people in a particular industry, there it would be relatively easy to say: "Here is an association of motor vehicle dealers. Let them have two or three representatives sitting in."

But if you are dealing with the public on those broad issues, for example, the waste management issue or a rate issue and so on, then it is a lot harder to define exactly who the public is, and in some senses it is indeed the board itself, reporting to its minister, reporting to the House in some way, which is essentially the public component, so it is hard to identify. If you can identify groups with a particular interest or even you say in effect that they speak for a large segment of the public, then surely they could be assisted financially and also with experts, or what have you, to assist them. Among the various things you could look at would be ways of ensuring that their participation was appropriate and efficient among the ADR.

1540

The Chair: Yes, but my question was directed towards the public component of the mediation and conciliation process. I think you have answered that to the extent that it is possible at this point.

Mr Campbell: As I say, the public varies so much.

Mr Sterling: I find the discussion fascinating in terms of trying to come to some kind of resolution. One of the problems I see in terms of agencies, boards and commissions in trying to reach fairness in decisions is that—I was a member of cabinet when they were trying to get the major power line from the Bruce generator down to this part of the province. Going through the process and the expense of that process and the problem of giving notice to everybody that it could happen in their end of the woods, there was always a question of whether or not there was somebody who misled people and all the rest of it.

The trouble is that I think in the next 10 years there may be necessities to make decisions in a more rapid fashion than in the past. While we would like to reach the zenith of fairness in approach, it is going to be difficult, I can see, in the next little while.

You do not see any way, in recognizing this public component, that the political process—politicians at one level or the other—can be involved in it. We are all elected people and we do represent a varied constituency from across the province and we do spend a lot of fruitless hours here, those of us who are not members of the executive council. I often wonder whether there might be more useful things for us to do from day to day, even if it was trying to recognize for an agency, board or commission who in the opinion of—perhaps nonpartisan as best as it could be—a committee who does represent the public in a certain situation?

Mr Campbell: Perhaps I can expand a little bit on my earlier remark in that we were speaking of the agencies, boards and commissions themselves as people appointed by government in one form or another, that very appointment being in some respects representative of the public. Certainly in Mr Macaulay's view, better training of our agency members and so on would assist them in understanding that role completely.

In the case of many agencies and boards there are indeed further appeals either to a minister or to the cabinet on issues of policy, so that while the agency may reach a decision, there is still room for further appeals on what might be called

the public interest component, so there is another feature there.

The third aspect of it, though, is that the agencies, boards and commissions are accountable, through the minister, to the various committees such as your committee on agencies, boards and commissions and also to the House. If there is a sense that the members of the agency, board or commission are not representing the public interest in the best sense or in the sense intended in that particular board, then there are remedies as well. Taking those three features into account, it seems to me that there is a reasonable safeguard for the public interest in that sense. I do not know that it would be appropriate to have, as sitting members of agencies, boards and commissions, sitting MPPs because you would be swamped with work and it would not necessarily be the best use of time.

Mr Sterling: There is one member of the Legislature who has been recently appointed to a commission, as you may know. It was a practice back in the early 1970s to do that. I do not think, quite frankly, that time would be wasted. I think it was in the early 1970s that Ontario Hydro—it was not uncommon during the 1960s and early 1970s—would have a member of the sitting government, a backbencher, sit on Ontario Hydro's board.

Mr Campbell: The Ontario Hydro board would not be necessarily an agency, board and commission of the sort we are talking about here.

Mr Sterling: Yes, but I was talking about the whole attitude of appointment. I always felt some comfort in a politician sitting on those so that at least some member of the Legislature had an idea of what was going on. At any rate, I would like to perhaps speak to you after.

Mr Campbell: Certainly.

The Chair: If there are no further questions, I want to thank Mr Campbell on behalf of members of the committee for sharing his ideas and recommendations with us. It is a very significant part of our process to look at the agencies, boards and commissions and how ADR can play a role in that particular area. I am sure it will form part of our final report when we report back to the Legislature. Thank you once again for sharing your ideas with us.

The Chair: The committee is adjourned until 10 am tomorrow morning in room 228; back to the original room.

The committee adjourned at 1546.

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Coulombe, Christiane, Chef du Service de médiation



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Legislative Assembly of Ontario

Standing Committee on Administration of Justice
Alternative Dispute Resolution



Second Session, 34th Parliament
Thursday 15 February 1990

Speaker: Honourable Hugh A. Edighoffer
Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday 15 February 1990

The committee met at 1037 in room 228.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: We will start the proceedings and get things under way. Our first witness this morning is Bonita J. Thompson, QC, partner at Singleton Urquhart Macdonald in Vancouver, who is chair of the Canadian Bar Association's task force on alternative dispute resolution and founding past executive director of the British Columbia International Commercial Arbitration Centre, one of only two in Canada. Ms Thompson, if you would proceed with your presentation, we will have some questions and answers afterwards.

BONITA J. THOMPSON

Ms Thompson: First of all, I might mention that although I have served in those capacities, I expect that many of my comments will be from a personal perspective, having been involved in this area for quite some time now. I understand as well that you have had some official representations, to a certain extent, from other people, for example, with respect to the Canadian bar, so my information will be on a personal basis. I think perhaps that might be the most useful for the committee in terms of the things it is undertaking.

I would like to divide my comments into three parts, allowing of course for questions as we go along. If there is an area that you have heard sufficient on and you would rather that I go on, I understand and appreciate that as well.

The first area that I thought might be useful would be to give you a little bit of background in terms of where I think we are at and where we are now in Canada, not, however, going into great, long detail about what ADR is or why it is beneficial, because I am sure you have probably heard aspects of that before, but perhaps to focus it in such a way as to have a better appreciation of the importance that government can play in these developments. Second, as I understand it, you are interested in specific things that are happening in the province of British Columbia, which has been very active in this area. Finally, I will focus specifically, as I understand it, on the use of alternative dispute resolution techniques in

commercial areas and perhaps give you some ideas and thoughts on the use of something, an organization like, for example, the arbitration centre in Vancouver, of which I was the founding executive director.

If that is agreeable to you, Mr Chairman, that is how I will proceed.

The Chair: That is fine. Please proceed.

Ms Thompson: First of all, why I think there has been this interest in this topic in Canada is a useful place to start. It comes out of a variety of things, I think; a variety of areas.

The first one is that typical response that Canadians tend to have to what is going on in the United States. We look across the border and we say: "There's an interesting trend. I wonder whether that applies to us. Let's take a look at it." We are usually about 15 years behind those kinds of social trends in the United States. I think once again, typically, we are doing the same thing here. So we cannot underestimate that aspect of these discussions. That is to say, we are very much influenced by the developments in the United States.

Second, and this is the one that I find particularly interesting personally, is an addressing of the philosophical and societal issues involved in how we resolve conflict in our society. That is the long-term perspective that I think is much more intriguing when we talk about the use of alternative dispute resolution techniques. In that regard—and you will see me coming back to this from time to time—I think that ADR, which is the phrase I will use today, is an issue that does not depend on, for example, its developments because of difficulties in the courtrooms. It is a development or series of developments which stand alone because of their value. They underlie a drive or desire on our part to have a peaceful and harmonious society. They also go to the question of the extent or degree to which the resources of society should be dedicated to resolving disputes among its members. That is the more interesting issue, I think, for ADR.

The third driving force in terms of why we are interested in Canada is the question of delay, cost and accessibility of our current justice system. I can say to you that in the Canadian context that is really only an issue in British Columbia and

Ontario. I have spoken with many people across Canada and it is simply not an issue in those other provinces. That is why, as well, it reinforces my belief that the concept of dispute resolution, how one resolves disputes in society, is the long-term perspective of this development. If you look at other provinces you will see they also are looking at ADR, but from the point of view of how it can be used in other specific areas. They are not using it or looking at it from the point of view of how it can save time, cost or whatever.

The other issue that comes up in this area, and I think it is an important one perhaps for this committee to be looking at as well, is to have some sense not only of what ADR can offer, but of how much of our current resources being dedicated to the justice system are going to certain kinds of disputes. For example, in British Columbia we have the Insurance Corporation of British Columbia, which provides automobile insurance for everybody in British Columbia. Sixty per cent of the writs that are issued in the cases set down for trial in the Vancouver registry, which is the largest registry in the province, are dedicated to those kinds of disputes; that is to say, personal injury matters arising out of automobile accidents. That is an inordinate number of cases taking up docket time, and those are not necessarily major or difficult issues. They are often minor whiplash cases, but unfortunately they take a lot of time and they take a lot of energy.

The other area, and this is unsubstantiated on my part but based upon my observations of the trial, is that I think the crown, crown corporations and other large corporations take an inordinate amount of judicial time. If you look at those cases, they are set down for 40 or 50 days, and what I am seeing, looking at it from a personal perspective, is an enormous amount of taxpayers' dollars and dollars dedicated to justice going to service crown disputes or disputes among large corporations. I just raise that as being an interesting issue in the context of where we should be spending our money in this area.

The fourth area in terms of why I think we have this interest in Canada is a very specific one, and that is as a result, I think, of activities by international businessmen in Canada and certain legal academics who have been working in this area. In 1986, as a result of a couple of years of energies, there was an immediate, very sudden and rather dramatic change, in terms of the availability of arbitration for Canadian businessmen in international contracts. As a result of that, every province in Canada now has international

arbitration legislation in place, and all of that was achieved within a matter of a few months. Canada signed a convention which applies to these kinds of disputes, after not having done so for a period of over 30 years. Also during that time period, the two arbitration centres were established, one in Quebec City and the other in Vancouver.

These things are very significant, because they were a direct result of political will. Many incredible things happened incredibly quickly because politicians decided they were going to happen. I leave that thought with you because I think that is another one of the areas that comes into play when you are considering policy that you might want to adopt in terms of the Ontario government.

The last area which I think has caused interest to grow in Canada in alternative dispute resolution is an economic one, and that is to say that there have been certain people who have identified this as a new area of professional activity. As soon as people start identifying this as a place that they can make a living at, all of a sudden professional organizations start to develop, become more active and begin to market certain services.

Those five areas are the reasons why I think there has been this renewed interest in Canada in this field.

How is this interest expressed? The 1970s and early 1980s is the time period I am talking about, not right now. There are five areas, again, that I can talk about, but I think it is important to note that all of these developments were really what I would call private sector initiatives. They were not really, with perhaps one major exception, issues that the public sector or governments took a real interest in. They were things that were happening sometimes in spite of what government was doing, or without too much concern about government intervention.

The first thing that was happening is that, by agreement, alternative dispute resolution mechanisms were being incorporated into relationships, most notably, for example, in labour. You found arbitration clauses and mediation and other forms of dispute resolution, by agreement, being incorporated into these relationships, a recognition by the parties that the traditional forms of resolving disputes simply were not effective and that other mechanisms should be used.

The maritime area, particularly internationally, has always been very, very hot on using arbitration. That is the preferred method for resolving these disputes. Notably, the system has

operated really outside the legal systems and in many cases lawyers have been discouraged from participating in them because their involvement in them was seen as counterproductive, because of a too legalistic approach to these kinds of disputes.

The other area under what I call the agreement area, in terms of how ADR was expressed, is in the commercial area. But this is interesting. Many commercial agreements in Canada have a reference to arbitration clauses in them, but when it comes time to try to resolve a dispute you will find that in most cases the lawyers will simply ignore them and wish they were not there or try to find a way of getting around them. I have been fascinated by these, the situations where I have seen many times that there will be a binding arbitration clause and agreement, two counsel on opposing sides. I would have thought that if one counsel decided to issue a writ, the other one, just to be difficult—which is typical of lawyers—would say, “No, you can’t do that because there’s an arbitration clause and we should go to arbitration.” But in fact what has happened is many times the two counsel preferred to circumvent the arbitration clause and go directly into the courts. I will talk in a little while about why I think the legal profession perhaps in some ways is one of the biggest obstacles to these developments.

The second area where ADR was sort of expressed was in legislation. I just finished saying to you that I did not think the public sector was too much involved in these early stages except in this regard, that when there were certain areas that required a different approach—most notably, labour law and family law—then the Legislature did respond in those circumstances to a major societal initiative. The other way we see this initiative being expressed is the very large number of administrative tribunals that were established to deal with a whole bunch of different kinds of ongoing issues in business relationships. So you will see legislation in the 1970s and early 1980s in that area.

The other area that you see is an increased number of training courses being offered in skills that are required in order to act in these areas. These training courses were usually outside the traditional legal areas. For example, in the Justice Institute of British Columbia, which I will talk to you about in a few minutes, these courses in conflict resolution were offered, and specifically requested by people like police, social workers, teachers and that sort of thing. So it was not initiative by the law; it was initiative by

people who were on the firing line all the time trying to deal with these disputes.

1050

Another development you saw at this time was associations of professionals—this is the economic part of it that I was saying—people who said, “Listen, maybe arbitration is a good way for me to make a living or a nice way to bring in some cash when I retire,” which was a typical response of people in this time. So we found associations of professionals coming up. As that generated interest, then those associations started to offer services to the public in this area.

The last area that we would see it in is ADR services attached to other kinds of social services. For example, the Better Business Bureaus in Canada have offered arbitration and mediation programs for quite some time as a membership service attached to other services that they offer. You often found in community groups or community organizations which have a social service aspect to them that they were often little groups of interested people who would offer these kinds of services as part of it.

Much of this time then, you could see ADR developing in what I call small pockets of keen, volunteer organizations. There was very little co-ordination of efforts in the provinces or across Canada with the exception of The Network: Interaction for Conflict Resolution, which I think Mr Peachey was talking to you about here yesterday—and that was one of the first real efforts—and Family Law Canada. What do they call themselves, Family Law Canada? I cannot remember the name of their organization. Those two tried to somehow bring together some of the people with common interests.

This afternoon, you will be hearing from the Arbitrators’ Institute of Canada, and there is another one of those professional organizations that, by virtue of its interest, began to establish chapters across the country. So we have these little groups and pockets of people, not really in too much of a co-ordinated effort, carrying on with their endeavours.

There was a major turning point in the mid-1980s. I think the turning point resulted because the government became actively interested in these issues. That is one of the messages that I am bringing, that the role and involvement of government in these kinds of things is most significant. There are different ways that the government can play a role, and I will talk about that later, but I found to my mind in this particular area the turning point came when political will was being expressed. And that political will

was being expressed because of a perceived crisis in the courts. So we saw your Zuber report, we have a Hughes commission report in Vancouver, the Manitoba justice inquiry, and I believe there is an inquiry starting in Alberta. Those kinds of issues where the government said we have to take a look at things because of perceived crisis in the courts all of a sudden began to focus some attention over to the ADR area.

Second, because of, as I mentioned to you, the development of international commercial arbitration in Canada as a whole new area, new legislation was developed and new centres created.

The third one, and perhaps another reason why the governments once again are so interested, is because there have been some very significant complex social problems with a strong public sector focus, which has required the government to look at them and say, "How should we be dealing with these problems?" The areas that I am talking about are, for example, things like native Indian land claims and otherwise, environmental issues, those sorts of things where the issues are not really well defined, where the interests of various groups are very different, where often it is difficult to identify even the parties which have an interest in the issue.

The courts are very good for resolving disputes where there are clearly identified people with interests, clearly identified issues, but when you get to larger societal issues like the environmental law issues, etc, the courts really are not working very well because the issues are not that well defined, the parties are not that well defined and somehow it does not quite fit into the structure that we know in our legal system.

The other difficulty, of course, and we have seen this demonstrated many times, is that enormous amounts of dollars and time are being spent resolving certain kinds of issues that probably should be resolved quietly behind closed doors. I think that has happened almost by default. That is to say, we have not really approached these issues differently because we have never thought of there being any other possible way of handling them. We find now, I think, that there is more of an effort to address the question of process, because many people in this field believe that the question of how you resolve the dispute is often more important than the actual results of the resolution.

That is a really tough one for the lawyers to get around. Lawyers tend to think in terms of the legal result, is this a correct legal result? That is how judges are trained to think, except perhaps

the judges who work in the small claims level, who are much more interested in dispensing justice in a different way, but at our superior court level they are interested in the legal points of view, and those are not necessarily the questions that should be asked in these other very difficult and complex questions.

The ADR movement has then been moving along. Let me describe to you now where I think some significant obstacles are to further development.

I am making an assumption here that may be incorrect, and the assumption that I will make is that, for the sake of argument in any event, the committee is of the view that there is some value to the use of ADR. I will assume that other people have been making that argument to you; I will not go into that area.

If we assume then that it is the case, what are the obstacles to further developments in this area? I think the first one that I can mention, and I have referred to it already, is resistance by the legal profession and by justice institutions. This is an interesting and difficult problem, because it is one of those subtle difficulties. If you are to talk to most lawyers, they will say, with a few exceptions, "Yes, I can see that using alternatives other than the courtroom to solve it is a very good idea," but then then when you put the question to them, "In this dispute here today, why don't you do that?" they always have a million reasons why not. There is a quiet, subtle, built-in resistance to utilizing these.

In most cases, it is my view that it is because the lawyers in question do not know what these processes mean. They do not understand them. They have never participated in them. When they go to law school they are trained in terms of the courtroom; they are not trained in terms of negotiation skills or other kinds or forms of ADR. That is one of the areas that the Canadian Bar Association is very concerned about: how we can make sure that lawyers are familiar with other options so that, at the very least, they are properly considered and put into perspective in the context of particular disputes.

The justice institutions: Need we really worry about them? Yes, I think we have to worry about their views. We have Chief Justice McEachern in British Columbia, who has gone public and made some statements that really, I think, put down ADR. I think his comments have been taken out of context in many cases, because what he is saying is that we always have to have the courts to deal with those situations where negotiated settlements are not possible.

I agree with him, we absolutely must, but that is not to say that using ADR techniques is any less valid or useful. Somehow I get the sense sometimes from the justice institutions and the judges that their class of justice is number one and anything else is something rather inferior. If that concept or feeling pervades the legal establishment, it is going to be very difficult for ADR techniques to move along quickly. I think that is one of the areas that we have to address.

The second area that I wanted to talk about, because I think it is particularly of importance to a committee such as yours, is the lack of supporting legislation or the existence of inappropriate or what I call inhospitable legislation. At the present time, I think British Columbia and to a more limited extent Quebec are the only provinces that have made any effort to take their arbitration legislation out of the 1800s and bring it into the 21st century. If we are to encourage legal counsel and parties to utilize arbitration, we must give them the supporting legislation that is required.

Your province has the opportunity and advantage of being able perhaps to tap into the work of the Uniform Law Conference of Canada, which, through a series of meetings, is addressing the question of a new uniform arbitration act in Canada.

1100

It is very important that if the parties commit themselves to participating in arbitration, that that is where their dispute is going to be dealt with. If, as is the case at the present time, someone embarks upon arbitration and finds that he is exposing himself to a whole bunch of court applications in respect of those proceedings, he is simply not going to bother going for arbitration.

In other words, what I am saying to you is that under the archaic legislation that exists here and in other provinces, if somebody commits himself to arbitration, he may well be committing himself to double costs—it is what I call parallel arbitral judicial proceedings—because at the present time this legislation allows the courts to intervene at various points.

If we accept arbitration as being a valid and appropriate method of resolving disputes, the courts should be told to keep their noses out of it, and that is a very difficult thing to do, but it can be done. We have done that in British Columbia, and in very specific signals. I will talk about legislation a little while later if you want to get into specifics, but that is absolutely crucial if people are going to utilize these other processes.

Once again, one of the problems, and I will admit it, is the lawyers, because if these other mechanisms are available for them to keep running into the courts and complaining about what is happening in arbitration, then they are going to do that. But if they commit themselves to a particular process, and if the parties want to do that, then that is where the process should begin and end. They should not be running back and forth to the courts. So that question of the lack of or inappropriate legislation is very important.

At the present time in Canada, we do not have any easy mechanism for interprovincial enforcement. That is another serious concern. If you have two companies doing business between provinces, there is at the present time no easy way to take an arbitral award made in one jurisdiction and enforce it in the other.

This is a rather strange anomaly. I do not know whether one of the other witnesses has addressed this question, but at the present time in Canada, it is much easier for a foreign company to come into Canada, into any one of the provinces, and register an award with the courts and enforce it against a Canadian company than it is for a company in one of the provinces in Canada to take an award made in that province and enforce it against the other company in another province. They are two entirely different systems.

There is absolutely no rationale for the distinction in how those two situations are dealt with. It is simply because in 1986 all of the governments were convinced that for our international arbitration to be effective in Canada, we all had to bring in this new method of enforcement, but at the present time the attorneys general still have not agreed that interprovincial enforcement of arbitral awards is something they should worry about. It is absolutely vital for Canadian commerce to have that kind of legislation in place.

There are other kinds of legislative initiatives that would be very helpful, in a positive and negative way, to reinforcing these developments. Other people, I am sure, will be dealing with those as well.

Another area, which I hesitate to raise because it is a two-edged point, is what I describe as another obstacle to further development. I phrase it this way: lack of demand. At the present time in Canada, we have a significant supply of people able to provide these services, but we have a lack of demand.

It seems to me that the normal response would be: "Well, if there's no demand, that must mean that people don't want it. Why are we bothering

spending all this time talking about it?" It seems to me that that is not the approach we should take. The lack of demand does not necessarily mean that there is not a need for this or that we should not bother. In my view, the lack of demand is because there are mixed messages from our major institutions—very strong mixed messages.

First of all, the legal community has a tendency to ascribe to alternative dispute resolution techniques what we call poor man's justice. In other words, it is seen as being something inferior to the justice one can get in the courts.

Another reason, I think, and I have certainly seen this in British Columbia, is that if we have a government which is encouraging parties to use alternative dispute resolution but does not itself use alternative dispute resolution, we then have a very strong mixed message that is being given to the people.

I think the other reason why there is a lack of demand is that there is lack of information available to the general public, or alternatively, the information that is being provided is inadequate or simply wrong. So the lack of demand is not because of a lack of need, it is simply because of lack of information in many cases.

Why is lack of demand an important issue in terms of the obstacles to further development? It is because people who wish to become professionals in this field will simply not continue to commit the energy and time required to maintain their credentials if there is no ability for them to exercise them. So that is a very important issue. I know a lot of people who spend an inordinate amount of time becoming very skilled as mediators and arbitrators and they are simply saying, "But we don't have anybody to use our skills on." So that is a very serious concern.

I had not realized how important it was in the context of volunteer work until a meeting I attended a couple of days ago. There are a great many volunteer mediators in British Columbia, and one of the difficulties that these community groups have is trying to keep their volunteers motivated and keen so they are available if and when required. The lack of demand sometimes allows that motivation to wane. What it means is that we do not have this method of keeping up the skills that we need in order to provide the best service possible.

I have saved the most important obstacle to the last, I think, and that is lack of funding. Lack of funding is one of the biggest obstacles to the developments in this area. I am not here to say to this committee that governments should necessarily be funding ADR. I am not saying that,

although I think that is one issue that should be raised. I am diffusing the issue of lack of funding, because lack of funding is a question of lack of revenues available to organizations to do the work that they should be doing.

Let me raise this question with you. I know I have heard your Attorney General (Mr Scott) speak on this issue in the past, and I think it is an important issue, and that is, should our current system, which is the justice system that we have, the court system we have, be dedicated to the provision of services to a very small, select few? That is the issue I raised with you earlier. In other words, if most of the court time is being used for provision of certain kinds of services to certain organizations that are very well funded, in many cases, what does that mean for the ordinary person? That is one of the concerns that I have.

For example, if you were to take the number of dollars that are being dedicated to maintaining the judicial system and say, looking at the spectrum of disputes that people are involved in, how much of this should be dedicated to resolving large corporation or crown disputes and how much of this should be dedicated to resolving the disputes that affect 98 per cent of our population—I have not done any analysis of this issue, but I would not be at all surprised if you would find that 98 per cent of the resources were being spent on two per cent and two per cent are getting—

You know what I am saying. In other words, the allocation of resources is not necessarily appropriate. If the governments of Canada feel that alternative dispute resolution is a valid and credible series of processes to be made available, I think it is also appropriate to address the question of whether or not money that is going into the justice system should be allocated to those kinds of activities.

What is interesting to me is that I have heard many people say to me: "Give us the statistics that show that these are good results. Give us an evaluation that shows that ADR works." There are a lot of evaluation processes going on on programs that are being developed, and I will talk about that in a few minutes as well, but I have never heard somebody ask the question in the context of the courts. Has somebody ever done an analysis or evaluation of how effective those processes are, whether they are a reasonable allocation of funds? That is one of the issues that I think is a very major issue.

Aside from direct funding into these kinds of organizations, there is another way that funding can be dealt with, and that is by encouraging

people to utilize ADR processes. ADR processes are by and large much cheaper than having a self-standing judicial system like we have, with the courthouses and the judges and all the staff. If it is possible to encourage people to utilize these other forms or ways of resolving disputes, then in most cases people will be quite prepared to pay the cost associated with them. That is my view, anyway.

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If that is the case, then one of the government actions, for example, could be to encourage people, by positive and negative reinforcements, to utilize other processes, which then brings an increased number of bodies over into these organizations, which could be run by the private sector, to allow them to have the sufficient amount of revenue to get up and running and keep the skill levels of their people going. In other words, sometimes the lack-of-demand issue will be the way of dealing with the lack-of-funding issue, and I think you would find for most of these organizations that you talk with that if they had simply more people utilizing their services, that that would cover the problem of funding.

I am assuming that you have had some people express views on whether or not they think that these processes are valuable. If I can just at this point intervene and give one example, one of the things that lawyers say about the current justice system is: "My client wants his day in court. We grew up in a system that says you have the opportunity to go to court and have your day in court. My client wants that."

We had an interesting situation at the arbitration centre recently where counsel brought a personal injury case to mediation after a very long discussion with her client. This lawyer felt that the plaintiff, her client, had a very, very good case, but she was also aware that the plaintiff was very unhappy about the delay taken in dealing with her case and also at the mental trauma of having to go through a most difficult court hearing, one which was going to be very personal with respect to her functioning as a mother and a wife. She really was not interested in participating in this. But at the same time, she wanted her say. She wanted to tell somebody how she felt, how she was injured.

The lawyer walked through the process with the client and they decided they would try this out. This woman and her husband attended at a mediation of this particular dispute and had their opportunity to tell their story to the party on the other side, who in this case happened to be an

insurance company that was dealing with the claim. They settled the dispute very quickly, but when they came out the lawyer said, "Now how do you feel about what has happened here?" The client, the plaintiff, said: "It was wonderful. I got to say face to face to somebody across the table how I have suffered, how I have been feeling." In other words, she had her "day in court."

What people need to feel sometimes is just the ability to talk about and participate in the resolution of the conflict. The best way I can explain this sometimes is to say it is like going into a hospital environment where you have got all these people talking about the gall bladder in bed number 4 and you say: "Hey, just a minute. I'm still here. I'm the gall bladder in bed number 4. Would you mind talking to me? This is my problem."

One of the things that ADR does is allow the parties to stay in control, a very important thing, and lawyers tend not to worry about that. He is the surgeon and he is interested in the gall bladder. He is often not so much interested in the person maintaining control. That is an important element of this whole thing, and I think that if ADR is properly marketed and people are better informed, they will prefer to use these processes in most cases.

Of those lawyers—and believe me, we beat lawyers over the head at the arbitration centre to get them to come and try this strange beast known as mediation—once they were there and tried it, they were sold. They thought it was fabulous, and even where they were not able to settle something, and that did not happen very often, they said it was well worth the time because they now know what the case is about and the difficulties that they might have if they proceed to court. So it was a very, very useful process.

I have talked some about some of the obstacles that are in the way of that and perhaps some suggestions on how we can address those, but let me talk now briefly about the positive steps that I think need to be taken, and I am going to be speaking here from a long-term perspective. I am not going to have specific suggestions on amending your section 49 to do so and so, I am going to talk in a long-term perspective, because it seems to me that is an advantage that a government has. They can take the long-term perspective in these issues. I am also going to be speaking personally, although if any of you have had an opportunity to look at the task force report of the Canadian Bar Association, you will see many of these ideas reflected in that report.

I have two main points I want to make in terms of positive steps that can be taken. The first one is in the area of education and the second one is what I call validation and recognition.

On the education side, I am talking about education at all levels of the community. I am talking about education at the school level, for adults in continuing education, the legal profession and for the judges. I am talking about all those levels.

One of the things I think we should be teaching our children is, we should be reinforcing the message that individuals are, with a very few exceptions, responsible for addressing and resolving the conflict in their own lives. You may say that is not a particularly earth-shattering statement, but it seems to me that, for example, just as we are moving away in terms of our medical care from a perspective that used to be, and for some still is, a paternalistic approach, so should we be saying to people in the context of our legal affairs, "You must take and assume more responsibility for the conflict in your life." From the medical side we say, "Eat better, live a better life, don't rely on me, the doctor, to solve your problems for you." We should say as well that in those areas of conflict in our lives we should take more personal responsibility for resolving our own disputes, we should not necessarily hand off to somebody else and say, "You solve my problems for me."

Alternative dispute resolution fits into that concept. ADR says that people should resolve disputes from their own perspective and should be active participants in that process. That is an important issue, it seems to me.

That issue is in a certain respect what we call an empowering issue. If you are hearing some people talk about mediation in these hearings, they will often talk in terms of empowering. If we give people the life skills necessary so that they can resolve disputes or conflicts among themselves, we are in many cases empowering those people. The justice system as we know it has tended to emphasize and be very concerned, and properly so, with imbalance of power, to protect the little person against the big corporation or whatever, but these other systems are also empowering systems. If you were to talk to a good mediator, he will explain to you how he can in the process of mediation, for example, assist two parties to negotiate on a level playing field. The job of the mediator is to help those two parties negotiate more effectively.

If we teach our children in public school and high school how to resolve conflicts among

themselves by giving them the skills they need to walk their way through these things, we will be empowering them in a way that will then carry through in terms of their response to conflict as adults as well. That is the long-term approach I am taking. Many of the activities by the people in the ADR field are being directed at that very basic education level, with some extremely exciting possibilities in terms of our future society.

If we look in particular, for example, at the problems of the inner-city schools in the larger centres, if we look at the implications of cross-cultural disputes when we have this massive influx of new immigrants into our communities, when we look at the kinds of difficult issues that occur in the remote areas between the native and white populations, many of these kinds of issues can be resolved using life skills that have been taught to these children when they are in school.

In the schools where these programs have been initiated—and there have been quite a few in British Columbia and some as well, I understand, in Ottawa—the difference in the demeanour of the children and teachers in the schools is quite remarkable. It is difficult to explain. I do not want to be evangelical about it, but it is quite true that it does have a profound effect.

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It is my view that if we start there, when these children are adults, they will carry through and take the same approach. In other words, they will see themselves as being responsible for their own messes. If they have a problem with a neighbour over cutting down a tree or their dog being poisoned because it is over bothering somebody else's dog, that sort of thing, they will see that as being something they should try to deal with instead of running down to the courthouse and saying, "Solve my problem for me." That is where alternative dispute resolution comes in.

On the education side, beyond the public and high schools, at the universities, business schools and law schools, of course, this is something that can be dealt with there, and that is an area the Canadian Bar Association is working on, but it seems to me that is one area where, from a government perspective, the government could say, "If this is worth while, if that concept is worth while, then we should encourage our Ministry of Education or those kinds of resources to be utilized to begin to develop those kinds of life skills."

The second positive step I want to talk about is what we call validation and recognition. Unless

ADR techniques like arbitration and mediation are validated and recognized, they simply will not have the impact they could have. Once again, I am assuming that that is a very positive impact. If we do not recognize those processes as being valuable and credible, they simply will not go anywhere. That is once again a very important area for government or public sector involvement.

The first way that these things can be validated and recognized, of course, is the funding issue. Once again, it is our old problem of scarce resources and allocation of them, but there is no question that funding issues are very important: funding for particular programs that can be developed, provision of these services, funding for proper training and perhaps, and much more interesting in terms of the long-term perspectives, funding for research and development. I will tell you about some interesting things that are happening in BC in that area shortly.

The second area for validation and recognition, which I referred to before, is by passing appropriate legislation that is required, supportive legislation. I am sure there are quite a number of examples in Ontario where you already have ADR processes built into your legislation.

For example, the Residential Tenancy Act in BC is an arbitration process. That was drafted in 1981 and all the cases have been taken out of the courts and put into an arbitration process. It is an arbitration that is facilitated by a government agency, but it is not done by a government agency. The arbitrators are all outside people who are not public servants. It is a very inexpensive system. It costs only \$35, I think, for the parties to apply for that process and it is available very, very quickly. It has worked extremely well.

I notice another very recent example where the government of BC has done this again. They have just passed a timber harvesting contract regulation and that regulation incorporates an arbitration process in what has been a very difficult relationship, the relationship between the very large lumber companies and the small timber harvesters. The differences between the powers and relationships between the organizations tended to make resolution of disputes very difficult and unfair in many cases, so they have built right into that contract an arbitration process. Those are examples of positive reinforcement by encouraging parties to go to ADR processes in those circumstances or specific situations when it would be appropriate to do so.

Legislation that can take place can be legislation, regulation or rules of court. All of those are areas where the public sector can have a positive impact.

The reinforcements that can be made for alternative dispute resolution, or actually any other kind of major societal change, are both positive and negative. For example, a positive reinforcement would be to say that a particular kind of dispute shall now be resolved by X. In other words, tell people where they should go. That is a direct positive reinforcement for the process.

Actually, you would be amazed at how easily people swing into that. Unless there is a significant vested economic interest in something, people are usually quite comfortable. There simply was not a big kerfuffle when the government moved into arbitration on residential tenancy matters, where there will be a significant hue and cry if they move into the personal injury automobile accident claims area, where a lot of lawyers have that as their bread and butter. That is when you run into problems, when it starts to stomp on some economic aspects.

On the negative side, one of my favourite negative reinforcements for people to change their approach would be this one: To have a rule of court which said that if the parties did not actively and in a bona fide way pursue some settlement process like mediation before going on to trial, when it came down to allocating disputes for trial time, that party would go to the bottom of the list. I do not know if your situation is the same as in BC, but we can have 10 matters come up for trial on Monday morning and the judge will stand up and say, "I'm sorry, gentlemen, I can only hear two this week, the rest of you are bumped." That is a very typical thing in our overcrowded situation.

Mr Cureatz: Sounds similar.

Ms Thompson: Sounds similar? My preference would be to have a rule which said that when you are on the trial list you get priority if you utilize mediation to try to resolve it.

The theory is, and I think it would prove to be true, because when people actively participate in mediation the stats show that 75 to 80 per cent of those cases settle. The difficulty is getting them to the table. The settlement usually follows fairly quickly. If it did not settle but they had actually done that and they are on the trial list, give them priority.

In other words, I want the lawyer who is sitting there with his client and who did not try it to have to explain to his client why he is not going to be

heard today. If lawyers are put in a situation where they have to give that kind of explanation, believe me, they are going to change next time. They do not want to be embarrassed in front of their client, nor do they want to lose business.

So there are different ways that you can get to change people's method of operating, and that is one of the areas why government is so important in initiating a changed direction or a new concept to approach something, because the government has the power to bring into play those kinds of positive or negative reinforcements which encourage people to change their current method of behaviour, and whenever you have got a vested economic interest in a certain kind of activity, you are going to have to have fairly significant pressure points to get people to change.

The other area where government is really important, it seems to me, in terms of validating and recognizing these developments is in terms of its own behaviour; that is, by way of example. It does not help one iota to have—I will use British Columbia as an example—the British Columbia government say, “We want everybody to use ADR now because the courts are overcrowded and we think you should do it,” and then turn around and insist on going to court whenever it has got a dispute. In some respects, it is a little bit like being a parent dealing with your children. The children learn by example, and if the government is committed to these kinds of processes, then it itself should use them in its own commercial relationships in appropriate cases.

I say in appropriate cases because at this point I want to put in parenthesis this statement: In my view, ADR is not a panacea. It is appropriate in some circumstances—in many circumstances—but not always. I do not want to be seen as advocating that position, that is simply not true, but in many, many cases the government could utilize ADR processes itself.

I have just finished working with BC Hydro, which is the largest crown corporation in BC, and it has now totally incorporated ADR in all of its construction contracts. They are now totally out of the courts in the event that there is any dispute. It is a very interesting concept. It develops the concept of interim disposition of disputes as the contract project is going on and it talks about referees and it talks about going to arbitration. No longer will a Hydro dispute in a large construction project, like the building of a dam, for example, clog up our courts as it has in the past. It will now be resolved internally through

these private, confidential dispute resolution mechanisms.

Another area, and this is a very difficult area because it is a political question in many regards, is that there are many kinds of disputes, like environmental disputes or land claim disputes, that have political overtones. We are seeing some very interesting developments in British Columbia right now where the government has decided that it will be willing to participate in a different kind of process to resolve a dispute.

There is a very interesting “mediation,” if I can put it in quotes, going on right now near Tofino. It is called the Clayoquot Sound mediation project, and there you have a big squall going on between a large company, MacMillan Bloedel, that wants to cut down all the forests, and the city of Tofino, which says, “We need these for tourism,” and the Indian claims, etc. There are a large number of people involved, and the government now is participating in a mediated process to try, by negotiation, to reach some consensus on how this particular dispute should be dealt with.

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To actually get the government to have, in this case, three deputy ministers at the table is quite incredible. To begin to be involved in those disputes is very interesting. To send somebody to the table who is knowledgeable and important enough to carry back a strong message to the government is also very important.

I understand that Ontario has something—what is it called, a native commission or Indian commission; the name of it just escapes me for the moment—where there was an effort being used to develop mediation techniques to resolve certain kinds of claims involving environmental issues and native law issues and that sort of thing.

One of the issues, and I put it to you squarely, is this: You cannot have it both ways. If there is going to be an effort to utilize ADR techniques or to mediate or negotiate some of these kinds of disputes, then everybody has to come to the table. It is not appropriate for one of the parties to say: “Well, we’re there but we’re not really there. We can talk, but we don’t know if we’re going to be bound by any decisions.” These processes require active, committed, bona fide involvement if they are going to work, and this is one of the toughest things for governments, I think, to address, and that is, how can they give up to a certain extent some of their reserved ability to say, “Well, you can go off and do what you want, but we’re going to decide at the end of the day whether we accept it or not”? It is a very

complex issue, but it is one of those issues that I think the government simply must address. I say government; I mean all governments in Canada. They simply have to address that issue.

In order for negotiations to be successful, the people who are at the table must have authority. Otherwise, it is a complete waste of time for everybody who is there. That is a very important area, I think, and some interesting things could develop there if the governments decide they want to be full participants in that kind of a process.

I will now move into the secondary subject that I wanted to talk about, and that is sort of telling you about some of the things that are happening in British Columbia specifically.

For the last three or four years, BC has been sort of a hotbed, I think, of all different kinds of things that have been going on which cover a whole different spectrum. If I can be a little bit blunt, I think it would be fair to say that the private sector has been much more active than the public sector in this regard. The public sector, meaning the government, has been quite hesitant in many respects to move as quickly as I think there is initiative to do. I am not really sure of why that is, maybe because it is not seen as sort of a sexy political issue or because the vested interests in place in terms of this current judicial system are too strong, I am really not sure, but clearly, most of the activity has been as a result of private sector activity.

We have two law schools in BC, and we also have a third university which has a very active business school. All of those schools are offering courses in conflict resolution and the numbers of students taking those courses is increasing.

However, it is also fair to say that the professorial contingent at most of the law schools in Canada is still not really committed to or fully informed about ADR processes in terms of the courses that they are presenting at the present time. I think a lot of them think it is sort of an interesting little seminar topic, but they do not see it as being part of the mainstream. So that is another one of the areas that we are concerned about. Still, there are courses being offered in the two law schools in BC and a lot more effort being made in that area, so I am quite encouraged by it.

We have two new what I call essentially research and development centres that have been developed in BC. One is called the UVic Dispute Resolution Centre and the other one is the Nemetz Centre for ADR, which is at the University of British Columbia. These are two organizations which are nonprofit societies.

They are being funded by grants from the private sector, and to a more limited extent from the public sector, to undertake research and development in a whole variety of areas. They are looking at accreditation and qualification of ADR professionals. The UVic centre is concentrating much more on community issues and has stated that as its main focus. It has just published a directory of all information that is in all of the libraries in BC on ADR. It is a directory and it tells you where the information is available and how to get it. That was just published. They are also working on a directory of ADR services that are available throughout the province and how you can get hold of them.

They are involved in putting together some very interesting seminars. One this summer, a closed seminar which is getting a lot of profile and interest, is one dealing with resolution of disputes respecting natural resources, which of course is one of the main areas we are concerned about in BC. There is also in the works a plan for a seminar dealing with education in the public and high-school systems and the use of ADR techniques in those schools. That is one of the areas that I was emphasizing before.

The Nemetz Centre for ADR was a little slower getting off the ground and has not produced as much, I think, as the UVic centre, but the focus of that school is a little more complex, and that may be why some of its projects are taking a little longer. Its research projects are much more sophisticated, I think, than the ones being undertaken currently by the UVic centre. The Nemetz centre is working right now on the development of a proposal to deal with native justice issues in alternative dispute resolution, which is a very interesting cross-cultural issue. They are also having discussions right now with some people who are involved in the Yukon and the resolution of land claims there, because there is a very complex and fascinating ADR process that has been built right into the contract that is being negotiated there.

They are working on a very exciting project with an Epsilon computer system. Right now they are putting all the data that deals with whiplash injuries into a database, and they are marrying that with a project with the BC arbitration centre to have a study and evaluation of whether or not personal injury cases of that nature can be resolved more efficiently using this database that is common to everybody and a good mediator to resolve the dispute. That is a very interesting research and development project in that very specific area. If it is successful, as I said

to you, because about 60 per cent of the cases in the Vancouver registry, which is the largest one, are going to those issues, that could relieve a major part of the congestion in our court system. It is a very interesting combination of computer technology, mediation and ADR.

The justice reform committee, the Hughes committee, had a chapter on alternative dispute resolution. I think most of the people in the field were a little disappointed at the fact that there were not more specific recommendations with ADR. The recommendations tended to be quite general. They were supportive, but it was interesting that the report started off by saying that—there was a phrase that was used; I wish I could remember it at the moment—suggesting that of course or naturally the court system is the primary function for resolving disputes, but blah blah and then went on to deal with ADR.

Once again, that report really reinforced that the courts are the primary function and the ADR is something sort of off to the side. I was a little disappointed in that. But there are some reforms that are coming down right now—they are in draft form and will be out soon—dealing with revised rules for the small claims court, whose jurisdiction has been raised, I think, to \$10,000, and building in a pre-trial conference situation, which really focuses on the possibilities of mediation before going to trial.

There is what they call the economic litigation program, which goes for disputes up to the value of \$20,000. The masters—which is something you have here in Ontario but which we have just really initiated in BC recently—have a lot of powers to work on settlement discussions and conferences with the disputing parties. That is sort of what we see as being the mediation part of that new economic litigation package. So various things that are happening or have happened in bits and pieces are incorporating the ADR process into the proposals prepared as a result of the justice reform committee.

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The Continuing Legal Education Society of British Columbia has taken a most exciting step. What they have done is they have spent time developing an alternative dispute resolution curriculum which talks about entry-level training programs for lawyers who have not really thought about issues in this way. It graduates up into training programs, generic programs on how to negotiate, how to mediate, how to arbitrate. Then it goes up one more level again where you have specific skills that you are learning as a solicitor to incorporate these into your contracts,

if you want to do a commercial mediation, a family mediation; in other words, different kinds of processes applied in different contexts. It is a very exciting program and one I think that might well serve as a basis for developments in other jurisdictions in Canada. That was as a result of a specific recommendation which came out of the Hughes report which said that there should be increased emphasis in training in these techniques at an advanced level.

One other area that I might mention with the provincial government that I did not mention is that bits and pieces of government activity have adopted ADR. For example, the purchasing commission, which is the main purchasing power for the government, has written arbitration into all of its contracts. About 40,000 contracts a year have arbitration clauses in them. The British Columbia Buildings Corp, which owns all the property effectively that the government has its offices on, uses arbitration clauses in all of its rental agreements, etc.

The native secretariat has staff who are skilled in mediation techniques and the native secretariat has been acting as a facilitator in disputes that have occurred between municipalities and Indians or the federal government and the Indians in various areas in the province. That is another area that I think we will see some very interesting things developing in, particularly because of the interests of the people who are working in that secretariat at the moment. I think that is one of the areas that has the most potential, if we work in that area.

There is a private organization—I think you are going to be hearing from somebody from the Private Court here at your hearings. We do not have a similar organization to that specifically in Vancouver. We have the British Columbia International Commercial Arbitration Centre. We have an organization called Pacific Rim Arbitrators Ltd, and that is a collection of about eight very high-powered counsel who have done arbitrations. I spoke with them the other day. They have been in business now for a year and a half and apparently they have not had a single case referred to them, so I leave that with you as an interesting piece of information. I say that in the context of commercial disputes because it is a question of how to get people to actually arbitrate their commercial disputes.

The Canadian Bar Association has launched a major initiative in BC on environmental issues. One of the main focuses of that work they are doing is to come up with a whole bunch of recommendations with respect to how alternative

dispute resolution can be used in environmental disputes. Once again in that area, the BC government has created or established a round table. I think there are about 25 leaders from industry and government who are around that table and one of the issues that they are looking at is how can we resolve these disputes in the most effective way possible.

In that same area as well, I spoke to the Ombudsman in BC and he is very keen on using these techniques in public sector disputes. One of the things that his organization is doing, because they are not supposed to be involved in disputes, is they are helping to develop techniques to put together specific mechanisms for specific disputes. For example, as I said to you earlier, one of the problems is that oftentimes in these kinds of disputes it is difficult to tie down what the issues are, who the parties should be at the table and what their interests are that are being represented. The Ombudsman's office is taking a very keen interest in developing new ways of packaging how these processes should work, and that is one of the most difficult parts of dealing with those kinds of issues, is how to grapple with the process.

It is a little bit like the problem they had in the peace talks with Vietnam. They spent a whole year trying to figure out what shape the table should be. So many of these disputes focus on those kinds of process issues because that is simply how it works, the process arguments are often the most difficult.

There are some professional organizations in BC that are very active. There is the Mediation Development Association which is a very strong and positive organization. It has existed now I think for about eight years. It is a cross-professional organization. It is very concerned with ethics, with training, with accreditation. They were just asked to prepare a report for the Attorney General on their recommendations for accreditation of mediators. I have not seen that report yet, but I understand it is in and being considered.

The British Columbia Arbitration and Mediation Institute is a chapter of the Arbitrators' Institute of Canada, which you will be hearing from this afternoon. They have a strong organization. They have about 200 members. They put on training programs for arbitrators in the fall and in the spring. The quality of those courses I would like to see improved. Nevertheless, that is the only source at the present time for training for arbitrators.

Most arbitrators you will find often tend to be people who come from a legal background and then have a technical expertise that is being applied in a particular kind of dispute. You will find that most skilled arbitrators have not come through a formal training program, but have simply evolved their abilities and techniques as they were actually involved in these disputes. I am not convinced that is the right way to go; nevertheless that is how it is done at the present time.

There is another organization, called the arbitrators' association of BC. That organization is primarily involved with labour matters. It tends to be a small group. There are only about 25 and these are the senior arbitrators who are functioning in the province.

We also have the Justice Institute of British Columbia, which at this point I think has put something like 2,200 people over the last few years through their mediation courses. Their course is a very highly developed curriculum and it is seen as a model for much of what is happening in Canada.

We have two very exciting programs going on right now as a result of funding from the Law Foundation of British Columbia. The West Coast Mediation Association, which is another organization of volunteer groups, and the White Rock/Surrey Mediation Society, and they are both launching major programs to deal with diverting small claims disputes into mediation. These programs are being funded by the law foundation and are being done in co-operation with the judiciary. In other words, when you go into a small claims court you will find material right on the desk which says: "Here's the mediation organization. This is how much it costs. Why don't you think about utilizing that process?" Those two programs are just starting and are being funded for a two-year period.

We had a similar program offered by another organization called the Victoria Dispute Resolution Centre, which has just completed two years. It is a very successful program. The judges in Victoria were most supportive. Many cases were referred over from the small claims court and the most exciting thing to me was the fact that the court decided that it would take a mediated settlement and allow it to be registered with the court and enforced as if it were a judgement of the court, which meant then that there was very little problem in terms of actual compliance with a mediated decision that had been reached by the parties.

The last thing I want to mention is that the government has agreed that there should be an alternative dispute resolution council established in BC. This council would consist of representatives of the major interest groups involved in this field in BC. There are two reasons I think primarily for the existence of this. One is to seek advice from this organization when policy issues are being developed in this field so that you are getting an expert view of things. The second is to act as a co-ordination body so that all of these different groups are not sort of repeating what the other is doing and everybody is finding a niche in the marketplace where they can operate successfully. You will find a great deal of co-operation in BC among all the various groups. Everybody tries to make sure everybody has got their own little place to operate without stomping on anybody else's toes. Of course, that is always a concern when there are scarce resources.

The third area, which is a bit dicey, is a question of whether or not this council might be used as a basis for fielding inquiries or allocating resources. In other words, if the government decides that it has a certain amount of money, would this council be a useful place to go and say, "How should this money best be allocated?" That is a tough decision and I am not so sure that it might not turn into a bit of a rooster match or something in the middle of a room like this one, but it is one of those possibilities for that council. To me, what is most important is that this is part of that recognition and validation process that is essential.

I can answer any more questions about that area if you want in a minute, but I have no idea of your time line here. I better go on to the commercial side, Mr Chairman.

The Chair: Okay. If you want to take a short break to get a drink of water or coffee or something, we would certainly concede that to you. You have been talking now for over an hour and it has been a very interesting and exciting dissertation.

Ms Thompson: I am fine. I am used to sort of nattering on about these issues.

The Chair: Okay, please continue.

Mr Ballinger: I was wondering if you have ever thought about selling used cars.

Mr Cureatz: Or running in politics.

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Mr Ballinger: I do not know anybody who is that good around here, Sam. Jeez.

Mr Polsinelli: To talk for an hour and make sense.

Mr Ballinger: That is right.

Ms Thompson: It is funny. I was talking from a personal perspective. When I was working at the arbitration centre, that is exactly what I was: I was a salesman and I just sort of fell into that position. It is funny how sometimes things in your life sort of go in circles and you end up reinforcing things that you believe. I always had difficulty in litigation because I thought people did not come out of it feeling right and I thought, "This isn't right." I just sort of fell into this process and now it has turned into a really strong feeling that I have that there has got to be a better way to deal with these things. So I am in the head-butting business, sort of selling, I suppose, the concept.

Mr Ballinger: You have learned the trade well.

Ms Thompson: Thank you.

Let me focus now on the area really where I became involved in this whole thing, and that was the commercial side. This is what I would call sort of the hard law area. This is the area that probably has some of the most exciting possibilities, I think, because of the nature of commerce.

First of all, speaking generally, I am going to talk about mediation and arbitration really. I do not think I will talk about anything else because you will hear other discussions about those. Why commerce is particularly amenable to alternative dispute resolution is because when you are dealing in a commercial section or sector, you are dealing with individuals who are used to controlling their environment. They are used to making their own decisions. That is why they are in the business. They are also driven by a bottom-line perspective. That is what people do in business. One of the difficulties that they have found with the justice system is that, all of a sudden, their control over that dispute is lost, and that is a very real concern and, second, the amount of money that they are putting in to resolve a dispute is often enormous. There is that constant bottom-line analysis.

What that means in many cases is that businessmen will walk away from an issue rather than having it resolved because it simply costs too much money to do so. That is one of the major concerns. So alternative dispute resolution offers some very significant and attractive possibilities to business people. In my view, if we get business people interested in these things, if we inform them about the possibilities, they will be a very strong reason for lawyers to change their views. In other words, if I as a business person go in and say, "Now, listen. I understand

that you know all about this court stuff. I want to try this other thing," and that is when there is a demand by the client for a change in service, then you are going to see that change.

So one of the things I want to do is, hopefully, emphasize the education of business people because if they see these advantages, they will go at it, but if they walk into a lawyer's office and the lawyer says, "Oh, forget about that. You don't want to do that stuff," then the issue is gone. So we have informed people asking for this.

The other thing that is important in this area when I talk about bottom-line perspective is that business people are not, generally speaking, interested in legal principles. They are interested in having a matter finished and over with. They are in the business of making money. They are not in the business of running fights. For some reason lawyers have a real tough time with this one. Lawyers will say to me, "No, we can't arbitrate the dispute because there's no appeal." When I talk to business people, they really do not care. They just want a decision and get it over with. They are really not that interested in, "Is this a correct interpretation of a law?" Now there are exceptions; I am generalizing.

Mr Ballinger: I want you to know there are four lawyers on this committee.

Ms Thompson: That is fine, that is fair game. I feel I can make these comments because I am one myself.

Mr Ballinger: I am not one of them. Go right ahead.

Ms Thompson: The other reason why I think these things are so attractive is because of the confidentiality issue. At the present time, there are many kinds of disputes which businessmen simply will not take into the courtroom because that exposes them in a way that they cannot be exposed. Because competition is so tight, because financial information is so important, because technology and trade secrets are so important, they cannot risk exposure of that information in an open courtroom. So confidentiality of these processes is a very valuable aspect of them. If the business people know they can walk in a room, close the door—no press, no outsiders, nothing; everything stays right in here—it is a very valuable thing for them.

The other thing I found too, and this is something we tend to forget about, again, particularly with small businesses, when you are talking about Joe the electrician or Martin the plumber, those guys want to be out there hustling their butts during the week making money. They

do not want to be sitting in a courtroom with arms crossed waiting to be called as a witness. These processes offer the possibilities of having these disputes dealt with at their convenience, on the weekends, at nights, whenever they want, not at the judge's convenience between 10 and four. So that is another very important aspect.

Finally, and probably the most important, I think, on the commercial side, is because of the nature of the dispute. Most business people do not want to damage an existing business relationship. They are in business to make money. Loss of a business relationship because of difficulties that occur in the process of resolving a dispute is very, very expensive.

I have always been amused to a certain extent at how, if you take very senior businessmen and ask them about a dispute, their perspective and how they talk about it will be different from the lawyers who are dealing with it or even perhaps the middle-management people who are feeding the information to the lawyers. I find their perspectives totally different. I find that often there is not any animosity, they want to deal with it on a bottom-line perspective, and many of the personality aspects of the dispute simply do not exist at that level. That is why I think as well that ADR offers some very interesting possibilities.

I think the most important thing for developments in this area, and this certainly affects my comments on how successful the arbitration centre is, is that people must have confidence in the process. That confidence has to come with knowing what is going to happen when the process is used. That is one of those that goes back again to that question of the proper legislative background. People have to know that if they agree to arbitrate, that is what they are going to be doing and they are not going to be doing something else. Certainty of process is very important.

What kind of legislation has to be in place? First of all, if the parties have agreed to arbitrate, the courts must acknowledge and stand behind that agreement.

I am flabbergasted at the number of judgments that I read where the parties have said, "We shall refer our disputes to arbitration," and notwithstanding all of that, you will find in the legislation that permits it the court will say, "Well, I see their agreement, but, you know, I really don't think it's convenient in this case," or "The dispute is too technical," or "There really are legal issues that should be dealt with here," and take it out of the hands of the parties again. You do not find that with any other term that you

find in a contract. If parties have agreed to something, the job of the court is to apply that term, but for some reason, in this case because of mentality from the 1800s, the courts are still in the position of saying, "I know you've agreed to do that, but you've changed your mind and now you can come back into the courtroom."

So that is one of the areas, and incidentally, these points are all covered in the new international legislation, that you have adopted in this province. There must be limited ability to intervene by the courts in the process. The process should be allowed to work its way through and there should be limited possibilities for intervention. Finally, there should be relative ease of enforcement of an arbitral award. Those are the three most important things, I think, that have to be in good legislation for this thing to work, and the international legislation that you have in this province is excellent. Canada is leading the world right now in its international legislation. If we could simply draw in that same approach into our domestic law, we will be doing extremely well.

The next point, to me, is the one that I spent most of my time selling when I was at the arbitration centre. This is one of the most problematic ones.

One of the reasons why a lot of lawyers have had a very bad experience or business people have had very bad experiences with arbitration is that when they walk into it, they do not know what is going to happen. I would liken it to this. Let's assume that you have got a dispute that is going to go to the courts and you walk up to the court and somebody says, "Okay, you come on such and such a day," and you walk up to the courtroom and you are sitting there and everybody looks at everybody and says, "Now what do we do," and nobody knows what they are supposed to do.

At the present time in our court system, we have rules of court that tell us what we do. It tells us when to do things, what documents to exchange, how long to take to do certain things. Arbitration does not have that at the present time. The legislation that we have internationally has a very loose framework, insufficient framework for most arbitrations, and most domestic arbitration legislation does not have any set of procedure available. Good procedure is absolutely essential. You cannot have a good arbitration, even with excellent arbitrators and counsel who know what they are doing, you have to have good procedure. People have got to know that when they embark on this, the time lines that they want

to have are all agreed upon in advance, etc. Procedures are very, very important.

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That really then kicks into another issue, and that other issue is, where do these procedures come from?

If you are involved with good counsel, they can often draft these procedures for you and craft them. Unfortunately, there are not many counsel around who understand arbitration or what they should be doing and it often just turns into another mini courtroom experience, which is unfortunate, but that is one place it happens.

Another place it could be is right in the legislation that you have. That is another possibility. In British Columbia what we did was, we have a cross-reference in our legislation to the rules of the arbitration centre. That obviously has important implications for the arbitration centre, because it means work is then shoved over to it through that process, but what it does is that it incorporates by reference the rules of procedure that have been adopted by the centre, which is a highly specialized organization which can provide those kinds of rules.

So that is absolutely essential. If you consider having arbitration procedures in the context of specific kinds of disputes, I urge you to consider the need for process to be developed, either through the public sector side, that is, in government, or through or under the auspices of another organization.

In that connection, I then come to a related issue, and that is administration of the arbitration. If you speak to most lawyers, most lawyers are going to say: "Well, we really don't need any rules of procedure and we really don't need anybody to help us do this. We can organize this, no problem at all. I'll just get my secretary to phone and book a room and blah-blah-blah." I am sorry; to my mind, that just does not cut it.

I am not wearing the arbitration centre hat when I am saying this any more, although I would have in the past. A good administrative body will keep an arbitration on track. It will handle the little details that need to be handled. It will move the parties along. It will help to resolve procedural issues that come along.

You are right, these things have to be paid for. I mean, that is part of the process and this is a private process and must be paid for. Nevertheless, I think an administrative body of some sort is really very important.

Otherwise, you are going to have some horror stories. You are going to have people come away saying: "See, I told you arbitration doesn't work.

We couldn't get so and so to do what and what, and we didn't have any good procedures in place. We couldn't get the other guy to agree on the arbitrator, and we couldn't find anybody who was qualified anyway, and blah-blah-blah." A good administrative body will take responsibility for a lot of those kinds of issues and deal with them.

It also enables the process to stay out of the courts. For example, in the rules of procedure that the arbitration centre in Vancouver has, one of the rules says that if there is an issue that comes up and you are challenging one of the arbitrators, you are saying he is biased or whatever—in other words, you are making a challenge of the arbitrator—that challenge goes to the centre. The provision in the act says you can take it to the court, but what we have done is that we then have a provision in the legislation, in the international act, that says, "If you have a right of challenge to the centre, you should not then go to the courts." The courts can decline jurisdiction.

What you can do using an administrative body is to have a lot of those issues that would normally go running over to the court resolved by an administrative body, and that has to be a very credible, very skilled, very professional organization. I always have worries about leaving these kinds of issues to voluntary organizations. It has to be really tight and very professional or you are going to have some bad cases.

Rules of procedure are also very important in connection with those parties who wish to be unrepresented. Whether lawyers like it or not, there are a lot of disputes that probably do not need legal intervention to have them resolved, but if we expect unrepresented parties to be able to go into an arbitration and run them on their own without any help, I think we are fooling ourselves, unless you have got a very, very skilled arbitrator and a very, very simple set of facts. If you have rules of procedure in place which can be used in the absence of agreement otherwise by the parties, then that helps to fill that void for unrepresented parties, and there are many kinds of disputes where you really do not need representation, you just need somebody to resolve the dispute for you.

The last area that really is very important, I think, is to have skilled arbitrators and counsel. I am sure you are going to hear some comments today from the Arbitrators' Institute on how it is working towards accreditation of arbitrators.

Bad arbitrators, just like bad judges, make bad cases. There is no question about it. At the present time in Canada, I would say most of the

appointments of arbitrators that are going on, and there are not that many, are through the old boys' network, or what I call the old boys' network: "Well, I know so-and-so and he'd do a good job if we gave him the case," or "Good ol' Charlie just retired. He's looking for a bit of work, why don't we hire him?" Bad mistake.

You have got to have somebody who understands what they are doing, what the rules are. Arbitration is not a totally informal proceeding. It has legal aspects. It should be done according to law, and the person in charge of it must understand that. The person in charge must also know how to deal with lawyers, who can be very difficult, and know how to handle them. Those kinds of things are very, very important.

Skilled counsel are very important as well. That is not something that a government can address. That is a question of education, once again. I have seen a lot of arbitrations go totally off the rail because lawyers did not know that an arbitration is different from a court proceeding. Instead, they try to run it like one, and I think that is most unfortunate.

How do we get these commercial people into this field? I have talked about things I thought were essential from a credibility and a recognition point of view. The sense that I had when I started my job at the centre in 1985—and this was instantly borne out through conversations I had with long-standing organizations like the American Arbitration Association, the International Chamber of Commerce and the London Court of International Arbitration—was that you will develop an arbitration practice area, if I can put it that way, when you develop a very thick bank of agreements that have arbitration clauses in them.

If you look, for example, at the American Arbitration Association, when it started in 1920 it had very few cases every year; 20 cases might have come to it. But over time, as the organization became credible, active and responsible, with good administrative procedures and good rules of procedure, it now administers in excess of 65,000 arbitrations annually in the United States, and that is in the last 70 years, I guess.

It is a bit like, when you do a will, if I can liken it to a will's practice. You know the guy is going to die some day, you are just not sure when. That is a little bit like what arbitration clauses are like. They are put in there, we hope you never have to use them, but that is where the business comes from, those arbitration clauses.

That is, for example, why the arbitration centre in Vancouver took a very, very strong marketing perspective and said, "In order to

secure the financial viability of this organization, our job is to get our clauses into as many agreements as we possibly can." That can be done by specific agreement, manuscripted into provisions. It can be done by having wholesale groups of kinds of disputes funnelling through by legislative action, for example.

Let's say, as a for instance, we decided that there would be legislation that says, "All electrical disputes henceforth shall have an arbitration clause referring all those disputes to the arbitration centre." That would be an example of using legislation and regulations to funnel through, and that is part of that lack of demand, lack of funding issue I was talking about before. If this government is interested at all in setting up that kind of an organization, it has to be interested in seeing how long it takes to set itself up.

On that very point, one of the things I quickly realized when we set up the centre was that we were not going to make it on international arbitration business in the initial time period that we set of three to five years. It could not be done.

I looked at the experience of the ICC, which is the largest international arbitral institution in the world. They only have annually 350 new cases and they are the biggest. The American Arbitration Association has about 150 international cases annually, as compared to about 65,000 domestic cases. The London court only has a little over 100 cases annually.

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Then you look at other organizations, like the maritime organizations or the grain exchanges. They have thousands of arbitrations that go through the administrative bodies they have set up. That is because they set it up and then they have a mechanism.

One of the reasons why the American Arbitration Association has been so successful is because very early on it got the construction associations in the United States to agree that all of their disputes go to arbitration under the American Arbitration Association rules. Once again, that has assured a constant source of business through that mechanism, and it has turned out very, very well.

In terms of the arbitration centre, a very unrealistic time line was given to the centre initially of three to five years, and I quickly realized there was no way we could do it that quickly; that is to say, become self-sufficient in that period of time. What we did was concentrate on developing our domestic arbitration practice. At the present time, the arbitration centre is

working very hard on developing its domestic commercial arbitration and mediation practices, and the international stuff is a constant flow. We are constantly dealing with that and marketing that area.

We see the development of a domestic base as being crucial to establishing the funding required to keep that organization going until the international community recognizes that for BC and also to developing the expertise we need in the legal community and the arbitration community to handle those very specialized international cases that will be coming to us. But funnelling into a specified area, through legislation or by agreement, is the most effective way of ensuring that these kinds of disputes eventually come into the centre and feed in.

The revenues—self-generated revenues—of the centre come from essentially two sources. The first source comes from the rental of the space. That is the most significant source of revenue at the moment, but it is also what I call the most significant short-term revenue aspect. We do not make money from renting the space; indeed, the money we make cannot possibly meet the expenses of the space, let alone the staff, etc.

The area where we make the most money is on the administration fees that we charge. That is why, if you have an organization like that, there has got to be an understanding that there have to be administrative fees built into it. The common practice of these organizations is to charge a percentage of the amount in dispute as the basis of the fees that are charged. That is how fees are generated by the centre.

At the present time, the centre is heavily subsidized by the provincial government. There is also a federal government component, which came through last year just before I left the arbitration centre. The goal is to become completely self-sufficient as soon as possible, but it does take a long time. That bank of cases does take a while to develop. There is no question about it, it is a long-term commitment if the government is going to embark on that kind of activity unless it finds a specific way of generating work and passing it through by regulations or whatever.

Perhaps just by way of summary, because I am sensitive to your time here, will this stuff work? I mean, is it real, is there a place for alternative dispute resolution in the commercial field? Yes, in my view, definitely, absolutely. It is not going to happen overnight; it is a long-term thing. But I foresee, for example, that in the next 10 years, if the proper things are done, we are going to see a

significant change in the approach that business people take to resolving their disputes and in the responses of lawyers to those.

If I can do this just as an aside—and this is a completely gratuitous remark on my part—one of the interesting things I think may have an impact in this area is the number of women who are joining the ranks of the legal profession. It is a gratuitous observation on my part that I think women and their approach to these issues is going to have an influence as well on how conflict is resolved in the legal profession.

Mr D. W. Smith: You are not part of the old boys' network?

Ms Thompson: I do not know if that is the issue, but I just think that in many cases women's approaches to these issues will be different.

The Chair: I think that Professor Paul Emond from Osgoode Hall law school, who was a witness a couple of days ago, stated the same thing.

Ms Thompson: I think it is going to make a difference. Having said that, however, I know there are a lot of very, very tenacious women barristers whom I would hate to run up against in a dark alley.

Mr Furlong: They are all practising in my area.

Ms Thompson: But I think that you will find it particularly in a solicitor's practice because, you see, many of these disputes will come through a solicitor's practice. I think you will see more solicitors, and people acting in that area, beginning to get involved in these disputes. Just as they are helpful in negotiating the terms of an agreement, I think more solicitors are going to be involved in helping to resolve a dispute without referring it over to a barrister's function.

I think it is very, very important that the necessary tools be in place for these developments. I think that is the important rule for the government here, to make sure that the appropriate legislation is in place to support this. If you want to move in this area, give the appropriate positive and negative reinforcements to allow for a change in behaviour in response to certain circumstances, investigate those substantive areas where you think you could funnel certain kinds of disputes off and into these ADR processes, work with your courts and your judges to see that they understand and appreciate the possibilities of ADR, not only in the context of their judicial proceedings, but as separate and different from judicial proceedings.

Patterns of behaviour cannot be changed overnight. They just cannot. It takes a long time to do it. But because of the values of particularly the maintenance of relationships, I think that alternative dispute resolution has a very, very positive societal benefit. I do not want to be appear evangelical about it, but I think that if we make a significant move in this area the concept of using consensus to resolve disputes will have a major impact on how our society in Canada operates.

Now my voice is tired. Now I will stop. Are there any questions?

The Chair: Thank you very much, Ms Thompson. I must say that your submission was very comprehensive and it crystallized a lot of the issues that other witnesses had raised. In fact, it answered a lot of questions that the members had asked two previous witnesses, so I thank you very much for that.

I have a couple of questions. They are in the area of maybe directing us as a committee a little bit in how we might focus on our report to the Legislature, which we will make when these particular hearings are completed.

I was happy to see that you characterized a number one issue as a philosophical long-term-perspective type of issue for society in how we resolve our disputes. I have asked that particular question to a number of previous witnesses. But in terms of government policy, if in fact the government of Ontario is going to embrace ADR as a principle that it should promote, how should a government adopt such a principle as a general principle that should be legislated in some fashion? How should that statement be made? Second, how does a government proceed in implementing that principle? How does it set its priorities? What sort of framework does it set up?

We talk about interprovincial enforcement, we talk about priority on trial lists, we talk about all kinds of individual ways that ADR is popping up all over the place like mushrooms. First, as government policy, how do we embrace the philosophy of ADR and, second, what process do we use to order our priorities in implementing particular policies? I know that is a tall question, but that is really what we might be coming down to in any recommendations that we might be making to the provincial Legislature and to the Attorney General.

Ms Thompson: I might get you in line with your question again because you have given me a lot of information there. The first question was sort of, "How do we do this?"

The Chair: How do we embrace ADR as a statement of government policy, and then how do we order our priorities of implementing the phenomenon of ADR, which is popping up in so many ways?

Ms Thompson: I think the way of phrasing it would—I mean, there are certain places in various governments where these kinds of policies really start. For example—and I am sure it is the same in Ontario as it is in British Columbia—if you decide that the way that you influence policy in government most effectively is through your treasury board or finance department, or whatever, which in most cases is where it is at. That would be the starting point for the beginning of the statement. The statement could be made by the government as a whole for the societal purposes, etc, and because of the access to justice issues, etc.

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How you begin to implement it, it seems to me, is in the allocation of resources. I am not just talking about dollars; I am talking about human resources, program resources, everything. One of the easiest ways to do it, initially, is in its own commercial practices. That is one of the easiest ways to start it, this business I call of living by example. If the government is truly committed to this, it would then say, "Our own commercial practices will be governed by this." Second, it could say as a matter of policy, "When we have very difficult and complex public sector problems, like environmental issues, we shall fully canvass and utilize these processes as appropriate."

In so far as, for example, the government is involved in the funding of other organizations, like municipal governments, school boards and hospital boards, through the vehicle of the financial administration or treasury board, or whatever the organization is here, you can say to those organizations, "As part of the funding to you, we require of you that you utilize these processes to resolve any disputes dealing with that issue." That is another powerful impact.

For example, I have been beating my head against a brick wall with the provincial government in British Columbia, with the Ministry of Transportation and Highways on its dispute resolution mechanism—incredible millions of dollars are involved in this process—to try to get it to realize that there are more effective ways of resolving these disputes. In other words, in your own commercial practices, in terms of how you give money out to other people, you can require

that they incorporate processes into their actual agreements.

There is another whole range of kinds of disputes that occur in government; for example, between government bodies. We find oftentimes that there will be disputes between ministries, "It's not my fault that the guy drove off the road. You didn't construct it properly," or "You didn't put the railing along the road," or "You didn't do this or that." In other words, we have a lot of intergovernmental disputes. Those kinds of things, as a matter of policy, shall be resolved privately, confidentially, by these kinds of processes. Those are the ways, I think, that you start to do that in terms of an internal mechanism. They are very easy to do, can be done just like that. It is really easy to do but there has to be will to do it.

The second area, I think, once again, as I focused on before, was that the government is the only body able to make legislative change with respect to the underlying legislation required to support these kinds of activities. The most important is your domestic arbitration legislation—priority. Get that in place. There has been lots of discussion by your people in that area because I have been involved in discussions with them. That is a very important priority there.

How your Attorney General interacts with the judiciary is another important area that can be canvassed. If your Attorney General decides, through government policy, to say, "Listen, this is very important for us," then it would be appropriate to be talking to the judiciary and saying: "We want you to be participating in this activity. We want you to tell us how you can, using the court system, build these processes in. We would like you to do it but we want it done." There is another direct influence on that kind of thing.

Finally, I guess the last one would be funding, the extent to which there should be perhaps some treasury board or financial administration analysis of how some funds can be allocated to develop programs to funnel these kinds of disputes off.

The other area I should reiterate again, in the legislation side, was that if you identify certain kinds of dispute areas that can be funnelled into ADR, then those should be identified and legislation passed.

In terms of priorities, I feel a bit presumptuous suggesting what Ontario government priorities should be, because I am really not sufficiently—

The Chair: Speak generally in terms of a provincial government in Canada which is

committed to ADR. In other words, how would you order their priority implementation?

Ms Thompson: Legislation first, absolutely. It is easy to do, it does not cost any money right off the bat. It is innocuous legislation and there is a lot of stuff prepared already, so there is not a lot of commitment to resources. So that is number one, very important.

Second, I would say, and once again this does not require any money to do it, except for a few human resources inside, is the commercial practice issue. Those are two incredibly strong statements.

I am of the view that as a result, for example, of BC Hydro's activities in British Columbia, which is the largest crown corporation, and its new contracts, the model that is built into that contract is going to go right through the whole construction industry in that province in the next five years. I am convinced of it. That is the kind of impact that a statement incorporated into agreements can have on a whole industry. So that is the kind of thing I think should be done.

The Chair: I have a couple of other questions. Do you think it is a reasonable area of investigation for the Provincial Auditor, for example, to look into the Ministry of the Attorney General and perhaps other ministries from the point of view of comprehensive auditing or value-for-dollar auditing relative to settling disputes so that part of the statements you are making could be demonstrated through financial investigation?

If we look at the cost of litigation, for example, of the Ministry of Attorney General in native land claims and environmental issues, related to value-for-dollar auditing and relating it specifically to the alternative dispute resolution alternative, or to other ministries which may become involved in litigation, if, for example, we were to relate it to the Ministry of Correctional Services, the provincial penal system, for example, to see what ADR can do to keep people out of jail, from the criminal point of view, do you think it would be a reasonable area of investigation for a Provincial Auditor, strictly looking at value-for-dollar auditing in this context?

Ms Thompson: Absolutely. I think it is this business of allocation of scarce resources for the purposes of minimizing conflict in society. This is not just a dollars-to-justice system, it is conflict in society, so absolutely I think it would be—it is one of those areas where I have found it very difficult to have discussions with people who have funds and they say, "What kind of evaluation do you have of your program?" We

can give them statistics and put valuations on, but then we say, "What kind of evaluation is there of the justice system as it currently sits?" There is not any.

I think that is a useful exercise. I think it probably has to be dealt with very carefully, because once again, it is the old issue of treading on economic toes. There is a lot of vested interest in the current system, but I think that would be a very useful and enlightening process. I think if you talk to a lot of lawyers and a lot of judges now, they have a pretty good sense of what some of these cases are costing, and they cost thousands and thousands of dollars.

The Chair: I have one final question, and it basically addresses one of the comments that Professor Paul Emond from Osgoode Hall Law School made and one of the comments that you made. Professor Emond suggested that what ADR needs in Ontario to really make it take off would be eight or 10 very substantial cases to have been resolved by ADR. He referred to the large native land claim types of cases. We have a very contentious issue in northern Ontario in the Temagami area concerning native land claims and environmental issues and so forth. You commented as well that that is an area where ADR could be very relevant.

The question that I have and a number of other people have raised is, how is the public interest represented in that type of claim? How does one basically set up an umbrella group representing a number of people or interests from the public or how many groups representing the public interest should be involved in the process, that whole area of public participation in the large environmental or native land claim types of issues, which are very politicized?

Ms Thompson: I do not know that you can give a specific answer in general. I just recently attended a Canadian Bar Association meeting in the environmental law area, and there was a mediator from Vancouver. His name is Allan Hope, a very well-known mediator in the labour field who had been asked to put together this Clayoquot mediation. The process that they are using there is evolving. In other words, this is brand new, they have never done it before, so what he is doing is to help the government say, "We've got these four groups"—which were easily identified—"but what you need is someone representing this group and you need someone representing that group," or whatever. In other words, one of the difficulties in this public sector area is, what are the issues and who are the proper parties?

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What we need is a responsible but flexible attitude. In other words, we need to allow people who are very skilled in putting these processes together the opportunity to do their job.

One of the things that came up, for example, in this case I was just talking about is that very clearly the government has not committed the necessary funds to allow the thing to happen. So if you do not put the money in to allow the process to evolve, it simply cannot happen. There has to be that confidence in the individual that he will actually be able to create this environment that allows the matter to be settled.

I am sensitive to this need on the one hand for the government to say, "We'll give it a try," but you sort of keep pulling your hand back. You commit because the people are there and they are the right people and they will make it work, and every case will be totally different, but in a sense it is a bit of risk-taking on the part of government, because if it wants to make this really work, what it is doing is giving up a bit of the control that it had before and diffusing it a bit.

But I think if you look at it from the point of view of saying, is the government always the best depositing place for the public interest; in other words, is it not possible that a whole bunch of different people from a whole bunch of different economic groups or interest groups can represent the collective interest as well as the government at the table, more effectively perhaps than a very narrow group of people in another—I think that is really what these issues are all about. As I say, it is almost impossible for one person or organization to represent all. You have got to somehow bring into that process all the people who need to be there, and it will vary. It will depend on the circumstances.

As I was saying to you, the Ombudsman in BC is very concerned about this issue. He is actually trying to develop a framework which can be used to help decide who the parties should be and what the issues are. In other words, he is developing some mechanism, and that is sort of a research and development issue to a certain extent. It is the kind of thing, for example, that Paul Emond would be useful at proposing in his area: "This is the framework. This is how you bring this dispute along and you sort of put it in this framework and you say, 'Okay, this is how we're going to figure what the issues are and who the parties should be.'" That is a very important point.

Mr D. W. Smith: Supplementary to what you have been talking about on funds, you said that

the provincial government of BC puts in substantial funds—I believe those were your words—and the feds have just started to put in some funds. What dollar amount might you be talking about here? Do you have any idea of what—

Ms Thompson: This is not confidential information. I think the budget of the centre now is probably over \$500,000 annually. My problem is I do not have up-to-date figures because I have not been there for a year now. I would think that probably two thirds of the budget is being met by government funding.

Mr D. W. Smith: Not two thirds from the province, but it could have been two thirds from the province up to a year ago?

Ms Thompson: Yes. What is being committed by the federal government is very, very insignificant compared to the provincial government commitment.

Mr D. W. Smith: I do not remember, but did you say how many cases you handle in BC under arbitration?

Ms Thompson: No, I did not give you that figure and I would rather not now, because I do not know how many the total is now. It would be—I just do not know.

Mr D. W. Smith: What about the 1987 figures, or 1989?

Ms Thompson: When I left, we had had about 200 mediations referred to us, and I am trying to think of how many arbitrations we had had. I am struggling with that issue. At the time that I left, I think we had had about eight or nine international cases come to us and maybe—I am excluding all the labour stuff. We had lots of labour stuff. Just on the commercial side, I think we may have had four or five at that point. So our biggest program at that point was the mediation program we had and the international side was very pleased. The number of cases we had at that point was excellent compared to other centres of a similar age, but the domestic side was very weak yet.

Mr D. W. Smith: It does not sound like many in numbers, but were these large settlements in terms of, I do not know, dollars or time-wise in the court? Would they be considered large settlements?

Ms Thompson: On the mediation side, I would think most of the cases would have been in the range of maybe between \$25,000 and \$50,000, so that is not very big. On the international side, we have had some that were several millions of dollars. That was a dollar figure that was—I think one, just before I left, was a \$4-million dispute.

Mr D. W. Smith: So you have not taken a lot of work away from the traditional lawyers?

Ms Thompson: No, I do not think so. I have never really seen the work of the centre as taking work away from somebody. What I saw it as being was providing another option to people to use a different mechanism.

The one area where one arguably could say that we were perhaps encroaching upon the courtroom space was the personal injury program. That, incidentally, which is a mediation program, is very active and has grown enormously in the last six months. It has just taken off. In that area, the answer I would have to the courts is that what is happening is that we are getting the settlement a year earlier than might otherwise take place.

In other words, most cases where writs are issued settle before they go to the courtroom. Something like 98 per cent of the cases, or 97 or something, settle before you actually get there. But they settle at the courtroom door, they do not settle a year earlier, when they could have been settled. So what mediation does is it moves back the settlement date, which means that it reduces

significantly the cost associated with that case. That is one of the advantages of mediation, for example, in the context of an ongoing judicial proceeding.

The Chair: Any further questions? If not, then I certainly want to thank you very much, Ms Thompson, for sharing your ideas and experiences with us in this area. I have to say this is one of the most comprehensive reports we have had on it and it will be extremely useful to us. When we do prepare a report for the Legislature, I think your submission will probably be the core area that we work with when we start putting it together, so thank you very much. We appreciate your time.

Ms Thompson: Thank you. I am sorry that I was not able to give you something in writing. My practice has just—

The Chair: It is all in Hansard.

Ms Thompson: Good. Thank you very much.

The Chair: The committee is adjourned until 2 pm this afternoon in this room.

The committee recessed at 1237.

AFTERNOON SITTING

The committee resumed at 1407.

The Chair: We will resume the proceedings of the standing committee on administration of justice. Our next presenter is Robert Blair, who is the chair of the Canadian Bar Association—Ontario subcommittee on alternative dispute resolution and a partner in Stockwood, Blair, Spies and Ashby of Toronto, and also a founder of the Private Court, a service providing experienced counsel as adjudicators in largely commercial disputes. The normal procedure is that the presenter would basically give some sort of presentation and then be open for questions and answers afterwards, so please proceed.

ROBERT A. BLAIR

Mr Blair: Thank you very much for inviting me to your proceedings. I did send up some materials, which I hope the members of the committee have received. I am sure you have not had a chance to review them.

I guess I would like to divide my comments into two parts. You have had before you already a long array of people dealing with the subject of ADR generally, and many, if not most, of them know a lot more about the subject than I do, particularly the lady who spoke to you this morning, Bonita Thompson. I would like to make some general comments on alternative dispute resolution in the commercial law setting initially and then, if I may, I will talk a little bit about the Private Court, because I think that is perhaps why I was contacted in the first place and asked to come.

In commercial law matters, the questions generally boil down to matters of dollars and cents, and sometimes even common sense. Business people who are engaged in disputes are becoming increasingly frustrated, as are people generally, with how long it takes to get their disputes resolved and what happens to the disputes in the process.

I was saying to Mr Fenson earlier that at 1:10 today I finished a case which is a prime example of why I am quite in favour of alternative dispute resolution. This was a commercial dispute, and it has been going now for eight years. The anniversary date of the commencement of the action will be some time next week; it started in February 1982. We have had 11 days of trial before a Supreme Court judge, three days in the Court of Appeal, and we are back before the

master for a reference as to damages and we have completed eight days.

This dispute, which has taken eight years to get to that point, and no doubt there is more still to come, could have been resolved if the business people in question, including my client, had really applied their minds to trying to resolve the dispute on a business basis in some forum other than the Supreme Court or the courts in general, because it was a dispute involving a subdivision agreement and whether or not the subdivider had complied with his obligations. Really, it was a simple business dispute, coloured by some ill feelings between the parties. It was a prime example of the kind of case that, in my view, can be dealt with, and should be dealt with, in most instances, outside of the court system, because there was no great issue of law involved.

The thing about commercial law and business law is that in 95 per cent of the cases where a dispute arises, it is really a matter of fact or it is a matter of resolving some interpretation of an agreement. It does not involve a real legal issue that needs to be or should be determined by a judge in a court. You do not get to deal, unfortunately for us commercial litigators, with many charter issues. They just do not happen in the business setting. So alternative dispute resolution is a ready-made venue for dealing with business disputes in a timely fashion and an effective fashion, in a fashion where the parties can know when their case is going to be dealt with and by whom it is going to be decided.

What frustrates business people most, in my experience, is how long it takes to get a matter dealt with and the amount of time that they and their employees have to spend in dealing with the matter over and over again, because what happens in the court system, just because of the way it works, is that you have various stages in the proceedings and those stages take place over quite a number of years, as I have explained. Every time you come to one of the intensive stages in the proceeding, you and your client have to sit down again, refresh your memory, go over all the documentation and get the employees involved and the management of the client involved, or if it is a sole proprietor, the poor sole proprietor has to sit with me for hours and hours refreshing ourselves again on this case. This happens three or four times in the course of a lawsuit: when you are getting ready for discoveries, when you are getting ready for trial,

when you are getting ready, in this case, for a reference, which was an offshoot of the trial.

All of that can be telescoped basically into one, at the most two kinds of proceeding if it is dealt with in another fashion by consent. So timeliness of dealing with the dispute is of great advantage, not only because it gets it done more quickly but because it relieves the time that employees, management and business people have to spend on the dispute.

Another source of great irritation and frustration to business people is not knowing when the case is going to be dealt with, even when it is ready for trial. I am sure other people must have told you that a case will come on a list of cases to be tried for a particular week and it may be tried that week, it may be tried the following week, it may be tried 18 weeks after that. It all depends on what happens to the cases that are lined up ahead of it. If all those cases settle, then you are on quickly. If none of those cases settle, then you are left hanging there for weeks and weeks.

With alternative dispute resolution mechanisms, you can have a fixed date and you know when your case is going to be dealt with. The other thing you know about that is who is going to deal with it, because in the Private Court, as I will explain when I come to it, you have a choice of your adjudicator, or who is going to determine the matter.

So costliness, inefficiencies, delays, uncertainty as to the time of the hearing, uncertainty as to who is going to be the trier of the dispute and time wasted by management and employees are, in my experience, the main factors that are lying behind this current impetus towards finding other means besides the court of dealing with business disputes.

In the paper that I have sent up to Mr Fenson and Mr Arnott, I have cited a number of quotations that reflect this growing discontent. One of them is by Abraham Lincoln. Another one is by the former Mr Justice Estey. You will see those in the paper. Basically what they show is that this search for other means has been here for a long time, and so has the dissatisfaction with normal court resolution of disputes, but in the last 10 years or so there has been a real impetus here in Ontario, and in Canada generally, to try to come to grips with it, partly because the courts are now so flooded with disputes that they simply cannot handle them.

I expect that you have been well versed by now on what the various options of alternative dispute resolution are: the concepts of negotiation, mediation and arbitration, private adjudication,

mini-trials and all of those things. I assume that is the case because of the speakers who I know have been before you. I will not go into that.

1420

What I would like to do, though, is to muse with you for a few moments—I guess that is the most accurate way to say it—because I do not have any fixed proposals to suggest to you. I would like to express some thoughts and some views on whether or not the Legislature should get involved in ADR, and if it should, should there be legislation, and basically should this concept be somehow attached to the court process?

Court-annexed ADR is what it is called. In the paper I have suggested that this is a good idea. I think that it is. Having said that, I also believe that there needs to be a role for ADR completely outside of the court system, that private individuals need to be able to resolve private disputes privately if they so desire.

In the court system itself, in my view, there is room for annexing this kind of process, or attaching this kind of process. It has been done in the United States and it has been done elsewhere, and I think it is good idea.

I think it is a good idea for a number of reasons, but one reason is that the lawyers and business people, generally speaking, are a little bit resistant to change. We are not the quickest people in the world to move into new areas, so when a concept like ADR comes along, there is natural reluctance to pick it up. Everybody thinks it is a good idea conceptually, but to utilize it in the particular case that comes in your door at a particular time is another question. I think that is partly a matter of education, which is one of the things that the Canadian Bar Association—Ontario committee that I am involved in is trying to do, but it is also partly a matter of a need for some sort of legislative or more directly judicial push towards it.

What I suggested in the paper is that what I have called a reference-like procedure be adopted and that it is worth thinking about amending the Courts of Justice Act and the rules of procedure to provide that a judge is entitled to compel the parties to go away at some stage in the proceeding and try to find another way of resolving this dispute outside of the court system and then come back and report to the judge in a reasonable period of time, say three months, as to whether or not they have managed to get an agreement, or if they have not got an agreement, why they have not got an agreement, or what it is they have been able to agree to, or have they gone

away and had their decision arbitrated or adjudicated in some fashion, in which case the judge can then decide whether or not to put his or her stamp of approval on that decision, which would then become a judgement.

There presently exists a reference procedure—I have just finished eight days of it—where a judge can refer a matter to another official to deal with the details. What I am suggesting here is analogous to that kind of procedure. It ties in nicely with the current process of court reform, because as a part of the court reform process an idea called case management is going to become a fact of life for litigators like me and others. That is to say, a judge is going to have carriage of a particular case, like they do in some American jurisdictions, from the very outset of the proceeding. The same judge is going to hear all the procedural motions and deal with all matters.

It seems to me that that process is ideally suited for tying in with some form of alternative dispute resolution, because the judge can say to the parties early in the proceeding, after the issues have been defined, as I suggest: “Go away, try to mediate this,” or “Go away, have this arbitrated,” or “Go away to the Private Court and see if you can get an adjudicated decision. Come back in a short period of time and let me know how you’ve done.”

It may not work in all the cases, but it surely will work in a lot of the cases. I say that from my experience, because when the pre-trial system was first introduced into the courts it was resisted, but by and large that has become a useful procedure for encouraging settlement.

One of the reasons why that is so is that sometimes all that is needed for the parties is for some independent person to look at the client or the client’s lawyer and say: “You know, you don’t have as good a case here as you think you have. Maybe you should consider settling it.” Often that is just the kind of push that you need. I think the court-annexed ADR in that sense might have a lot to say for it and it is something that this committee might want to consider proposing. It requires a little more thinking. I am in favour of the idea of some sort of court-annexed ADR, because I think you need to have that judicial push to get the legal profession as a whole more open to utilizing the process, unfortunately, but I think that is perhaps the case.

Another advantage of some sort of legislative sanction of the concept is just that. If the public knows that Parliament has put its stamp of approval on this concept, then it is more likely to be openly accepted, I think. There is a certain

comfort that comes from knowing that the Legislature has considered this and has said that this is a legitimate means of resolving your dispute. Furthermore, once there is legislation, people have something to go to and look at and they can say, “This is what it is and this is how it works.”

This may require not much more than a few simple amendments to the Arbitrations Act to accomplish, it seems to me. Some of it may be more symbolic than not, but anything helps. Anything which will help people resolve their disputes more quickly and less expensively I am in favour of. Anything that will help remove the backlog in the courts I am in favour of. I think both of those really are issues that everybody is in favour of.

I ran into a district court judge yesterday when I was walking back to my office and I was telling him, as he is interested in this subject, that I was coming to speak to this committee today. He wanted to know whether I was going to present a pro-ADR stance and not an anti-ADR stance and I said, “I’m quite in favour of it.” He said: “Good for you. I’m in favour of anything that will help clear up the backlog.” So in the judiciary I think there is quite a good acceptance of something of this nature.

I would like to just make a few remarks about the Private Court and then I will stop and field any questions. The Private Court is a private business. It is a corporation that has been established by several lawyers, of whom I am one. We have been in operation now for about a year. The idea behind the Private Court is to present, mostly to business people, an opportunity to submit their disputes to an adjudicator whom they will choose and who will make a binding decision quickly and effectively. There are three panels of adjudicators. You should have a list in the materials that I sent up of the people who are on the various panels.

The idea is threefold. The first idea is to see if the parties can settle the case quickly. The second idea is that if that is not so, let’s get it resolved quickly. The third idea is to do it as effectively and cost-efficiently as you can.

The process is divided into several parts, but before I go into that, I should say that the difference between the Private Court and arbitration is essentially that the Private Court presents all the courtlike trappings of litigation that arbitration, generally speaking, does not. By that I mean discoveries if the parties want to have discoveries, full disclosure and production of documents if that is what the parties want,

whatever is in the court system that they want to use.

In most cases, the arbitration process does not do that, and one of the reasons why commercial lawyers and litigation lawyers are reluctant to advise their clients to go to arbitration is that those things make us comfortable. We have grown up in the system that says, "You've got to have all these protections." So with the Private Court we say: "These are all available to you, but you don't have to use them. You decide what you want to use. You tailor the procedure to fit your case, not the case to fit the procedure." That is essentially the difference between the Private Court and arbitration, both of which are methods of private adjudication.

The first emphasis is early and repeated settlement conferences. You choose the adjudicator you want to help you resolve this dispute. You exchange some paper that defines the issues and you sit down and try to settle it. You do not worry about anything else. You try to settle it. If you cannot settle it, then you work out the procedure. That is a little different from the way things normally work now because they are always clouded with keeping one eye on the procedure. As I say, when you are at the procedure stage, you try to tailor the procedure to the case rather than the reverse.

Once you have done that and if you are not able to settle it, then you simply set up a hearing and you have whatever prehearing procedures you want or you do not have whatever prehearing procedures you do not want. The magic of it is that all of this can be done really at the timing of the parties and their lawyers. There is not any reason why a dispute which is even reasonably complicated cannot be dealt with in less than three months, because it is really a matter of the availability of the parties and the panelists. There is no backlog to be dealt with.

Underlying all that structure is the concept of quickness, flexibility, informality and confidentiality. In the private sector, confidentiality is a big plus for business people. They often do not want to have their disputes aired in public. That is an item that would be lost with court-annexed ADR, I think, but that is quite appropriate in the public sector, and fixed dates, as I said.

Those are all the concepts underlying the Private Court. It is an elaborate set of rules, but basically they are the same as the rules that all litigation lawyers are familiar with; they are just tightened up in terms of timing and they provide a little bit more flexibility.

After the hearing, the adjudicator makes an award. That award is the same as an arbitration award under the Arbitrations Act and it is enforceable just as if it were a judgement of the Supreme Court of Ontario. There are appeal rights. One of the concerns that is expressed from time to time is that somehow or other your appeal rights are cut off in this system. That is not so. You have three options. You can decide that there will be no appeal, as some people do because they want to have it over once the first round is finished, or you can have an appeal to a three-member panel of the Private Court—in other words, you can stay within the Private Court—or you can go to the Divisional Court, which is a part of the Supreme Court of Ontario and that gets it into the public system, but it is a full appeal to an appellant level of the Supreme Court of Ontario.

There are costs involved. That is why the Private Court is probably more appropriate for commercial business disputes than other disputes. It is a fact of life that people have to be able to pay for the service. There is an adjudicator's fee, which is \$1,000 each half day. There is a schedule in the materials that I have sent to you for settlement hearings, fees and so forth. That may sound like a lot of money, but really it is based on the premise that there will be two or three hours of preparation with every two hours of hearing, and because it is a fixed fee, and that includes the time for writing the judgement, it is calculated at about \$200 an hour. That still may seem like a lot of money to you, but in reality that is quite considerably less than the hourly rates that are charged in downtown Toronto and by most of the people at that level who are on our panel. On those terms, those rates are quite reasonable.

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There is a sliding-scale administrator's fee as well. It goes from a minimum of \$500, for cases involving less than \$50,000, to a maximum of \$4,000, I think it is, for the boxcar cases. In business terms, we think that those are reasonable prices to pay for quick and expeditious settlement and resolution of a dispute.

I guess I might pause there and ask if there are any questions.

Mr Cureatz: I was wondering in terms of the panel, although I did miss the first part of your presentation, I guess they are not called judges. Are they called judges actually?

Mr Blair: No. They are called adjudicators. The reason for that is that they are not judges; they are lawyers. The Private Court is modelled

to a large extent after a system in the United States called "Judicate." That is the system that the media refers to as private judges. The reason for that is that in the US there is a large pool of retired judges or non-re-elected judges and so forth who are available. We do not really have that here in Ontario. We do have one retired judge, Mr Justice Hughes, on the panel and in due course there may be others, but at the moment we do not. These are senior lawyers. There are both litigators and solicitors.

Mr Cureatz: How many adjudicators do you have on the panel, 15, 35?

Mr Blair: I can give you the exact number. I think it is in the mid-30s, by the looks of it.

Mr Cureatz: Is there a greater percentage of ones used on a more regular basis?

Mr Blair: That should be in the material we have.

Mr Cureatz: It has been operating about two or three years?

Mr Blair: No, it has not; about a year.

Mr Cureatz: Oh, is that all it has been operating? I think it would be worth while and it would be interesting to see if there are ones who are used regularly and if there is a degree of expertise. I think it is a great idea. It is just sort of feeling your way towards a consistency of experts who are being used. I mean, how do you sort this out? They have to agree. I remember reading something about it. Both sides have to agree to which person—

Mr Blair: They have to agree to the adjudicator. The whole thing is consensual. You have to agree to come into the system in the first place. You cannot force the other person's client to go to the Private Court.

Mr Cureatz: I do have other questions. It is just that there are so many, you know what I mean, with such an innovative process. Is there any kind of percentage in terms of those that would go to the Private Court as opposed to going to the regular court system? I guess they would all have normally gone to the regular court system.

Mr Blair: We do not have those kinds of statistics because we are still getting under way. Our mechanism is still very much in the process of being accepted. I have mentioned in my materials a report from the United States Centre for Public Resources which quotes an article which says, in the US, half of the companies that comprise the Fortune 500 have made a commit-

ment to try and have their disputes settled outside of the court system. I have that quote.

Mr Cureatz: That is quite a large commitment. Boy.

Mr Blair: Yes, indeed it is. It is at the bottom of page 2 of the paper that I sent up: "As of late 1986," this centre, which is a large centre, reported that "more than half the companies that comprise the Fortune 500 had signed a pledge saying that they would try to use less expensive, less time-consuming alternatives to litigation in conflicts with each other. More than 25 major insurance companies had a similar commitment. In all," this report indicates, "companies accounting for more than one quarter of the entire gross national product had promised to take all reasonable steps to stay out of court against each other." Now, this is the United States and we, as is always the case, lag behind the US.

Mr Cureatz: What are the complications advising clients of using the system? Is it tough to sell?

Mr Blair: It is a little tough to sell, yes, partly because of the reluctance to get into something new. You have to persuade them that the result will be as good as the result they get from a Supreme Court judge. You have to persuade them that all their rights will be protected, and you have to persuade them that it is appropriate for their own private agenda. It is a good idea. Most people agree. A lot of people do not, but a lot of people agree it is a good idea. Most lawyers, when you talk to them, say, "This is a great idea, but when we are faced with our particular case—" I have to say this too, and I am a part of it—"I have to consider what my client's agenda is."

Mr Cureatz: If they want to delay it, they do not want to go into it.

Mr Blair: Do they want to delay it or do they not want to delay it? That is partly an educational process, because I am convinced that this whole bogymen that delay favours the defendant is nonsense in the business context. It just is not the case when you take into account the time and the cost of management and employees and all the rest of the staying involved. It is silly, but it is a perception that is there and it is the kind of thing you have to meet.

The whole idea, including the Private Court, is more and more being accepted. We get calls now from people who say: "We are writing up an agreement. We want to put in a clause. Do you have a clause that says the disputes will be referred to the Private Court?" It just so happens

that we do have such a clause. There are such clauses around. Someone from McDonald's called me on that not too long ago.

Mr McGuinty: I find the idea fascinating. I guess, by analogy, we now have private hospitals. I know of one case in the Ottawa area where a hospital that had been run through government auspices for years as a great burden was taken over. Of course, this is a big industry in the United States. They are doing it more effectively. I think in parts of the United States they have private prisons. People set up prisons operating on a profit-making basis. We have a private mail distribution system in Canada, which in some unique ways for some people renders a service not available through the model ethic structure of our Canada Post, and I guess private courts are a logical extension and application.

I can see how, in some way, they might also serve a purpose that Mr McMurtry alluded to the other day, by which I was very much impressed. In his opening remarks he said something to the effect that one of the marks of a civilized society is the availability of due process of which people can avail themselves. I think that this idea, certainly as a kind of supplementary spinoff effect, does that. I think it is an intriguing idea.

The costs that you cite are significantly different from the ones the young lady from Washington cited the other day. That was rather incredible for mediation. The mediator is paid \$25 per case. I think the arbitrator is paid \$200. Now, given, the court structure to which you allude is much more sophisticated. It calls upon a much higher degree of professional expertise and competence. I think it is an idea whose time has come.

I suspect there is a mindset within the people in the legal industry who know our business, possibly among the older members of the profession. Do you get much resistance, resentment, negative criticism, opposition?

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Mr Blair: I would say it is 75 per cent favourable. There is some resistance. There are a lot of questions. There are people who think it is not a good idea that you just have to have all that court-imposed process to be able to deal with a dispute effectively; but by and large the bench has been supportive of this idea and so were the members of the bar.

Mr McGuinty: Emond made a very, I thought to my mind, encouraging comment the other day that in his view, at Osgoode in the last five or six years, there has been a change in outlook noticeable on the part of students, who no longer

seem to be as disposed towards a confrontational court atmosphere as the end-all and be-all and are much more sympathetically disposed towards mediation, arbitration and, by extension, the kind of thing to which you allude.

He attributed that in part to the fact that a higher percentage of the students now are young ladies, and that might be. There is a sensitivity. I am very careful here, Cindy. I do not want to say anything sexist, but I think there might very well be a sensitivity that ladies bring to this field. I was going to say maternal sensitivity.

Miss Nicholas: I do not know. You were calling us sleazebags yesterday.

Mr McGuinty: No, I did not.

Miss Nicholas: Lawyers.

Mr McGuinty: I never, never, never called you a sleazebag, any lawyer.

Miss Nicholas: I thought I heard that.

Mr McGuinty: No, no, no. I did not spend \$300,000 to raise four sleazebag lawyers.

The Chair: If I might interject for a minute, you were both absent this morning when Bonita Thompson was here and she made almost the identical statement that Professor Paul Emond made, that she attributed part of the tendency towards alternative dispute resolution from the fact that there are a lot more women in the legal profession.

Mr McGuinty: I certainly accept that.

Mr Blair: I attribute it partly to the work of people like Paul Emond and other people in the universities who are developing courses now that deal with ADR. I know that Paul has a course like that.

Mr McGuinty: Yes, his seminars; he cannot satisfy the demand.

Mr Blair: There is a professor named Martha Bailey who holds a course at Queen's law school on ADR. She asked me to come down and speak to it, and I did. This class was at 8:30 on Monday morning. I am graduate of Queen's so I remember eight o'clock classes not being very well attended, mostly because I was not there to observe them, but this class was full. They were the most active and interested bunch of individuals, young people, about half women and half men. There is a growing interest and that is all part of the educational process.

One of the things that the CBAO committee that I am on is looking to do is to encourage this kind of addition to university courses and the bar admission course of the ADR concept.

Mr McGuinty: Thank you very much, sir. It was very interesting.

Mr Blair: Thank you for your comments.

The Chair: Mr Fenson has a question or two and then I believe Mr Furlong has some questions.

Mr Fenson: Is it too early to tell yet whether the future clients in the Private Court are likely to choose less procedure or more procedure in the range available to them?

Mr Blair: I think it is too early to tell, but my guess would be less.

Mr Fenson: Less. What about appeals? What do you think is going to happen? Are they going to choose no appeal or appeal within the private system?

Mr Blair: There have not been any appeals yet.

Mr Fenson: There have not been any appeals yet. Well, that says something.

Mr Furlong: What would be your case load? It has been in operation a year, you said.

Mr Blair: Yes.

Mr Furlong: What is the case load?

Mr Blair: I cannot give you a very accurate answer for that because I really do not know. All of this is confidential, and I am not privy to that. I will say it is not as heavy as I hoped it would be, but we are getting inquiries and we get cases coming in monthly.

Mr Furlong: I presume that most of the adjudicators carry on private practice.

Mr Blair: Oh, yes.

Mr Furlong: What has been the experience in terms of the outcome? Are people generally satisfied with the expertise of these adjudicators or have you run into any difficulty where someone may indicate that this individual is not a judge or does not have the qualifications.

Mr Blair: We have never had any complaints.

Mr Furlong: How do you select your adjudicators?

Mr Blair: There is no scientific answer for that. The people we asked and selected are people who are senior lawyers, mostly all in Metro for the time being because that is where we are based. They are lawyers whom we know and they are lawyers whom we know are interested in the difficulties that exist in the present system and would like to see some steps made to help resolve them. It is partly network, it is partly reputation and it is partly involvement in coping

with problems that exist in the courts. There could be another panel just as distinguished.

Mr Furlong: You indicated that they are concerned, the lawyers who know of the difficulties in the current process. Is there an effort on behalf of these adjudicators who are doing this kind of work to sort of do two things? One is to provide the private practice and the second thing is to improve the process. You are talking about commercial adjudication here. I happened to be in a spot yesterday where I was looking at an assignment court list, and I would say that out of the 130 cases that were on it not one of them would have selected a private adjudication because we were not talking big money; we were talking sort of average claims in the Durham region.

Mr Blair: Why would they not, though?

Mr Furlong: Because, first of all, I do not think they would want to pay for it. Second, perhaps it is faster in the Durham region than it would be in Metro Toronto, I do not know.

Mr Blair: I am not sure that is so.

Mr Furlong: When I hear about all of this, I wonder sometimes whether we are talking about a system, something for Toronto and something for outside Toronto, if you are looking at the time factor being one where you can get your case heard quickly and therefore maybe it is cheaper. You are getting the expertise of someone who perhaps has been in civil litigation, has been a defendant and a plaintiff in these cases, knows something about the law. I am not sure about the ability to sit down in court and be a judge.

My concern, and I was thinking yesterday after having heard some of this, perhaps what we need is for the Attorney General (Mr Scott) to appoint, maybe one week a month, a whole bunch of agents or private adjudicators who could sit as judges and say, "We're going to deal with all these cases, all these backlogs," and have them in hotel rooms and every other place that you want to so they are not using up the court facilities. And then just simply say: "Look, it's done, the list is shortened. Now you're going to be able to get your case on."

Mr Blair: That might work. It might be that the backlog is an urban problem. There are certainly areas in the province where the lists are less congested than they are in Toronto, but in Ottawa and in the major urban centres you have got the same problem.

Mr Furlong: I appreciate that if you come into Toronto or you go to Durham region or you go to Cobourg, you are looking at three very different

operations. I would appreciate, I suppose, the private practice in the Metro Toronto area because the delay is really serious. I am not so sure that it would work in Cobourg.

Mr Blair: I put a case on the list in Timiskaming, hoping I would get it on faster up there, but it has not worked yet.

Mr Furlong: I am involved in a case. The writ was issued in 1983 and here we are in 1990 and maybe it will go this year. But it is Toronto. The case was on the list for a year and it is going to be heard on 5 March.

Mr Blair: These solutions are not panaceas. They are not solutions for all problems, but they help. Certainly what you said about appointing a bunch of people to deal with problems reminds me that I just received some materials last week from a lawyer up in Sault Ste Marie. What they have done in the Sault, apart from the fact that they are going to have this case management system, is that they have set up, in this case, the family law panel. They hope to do it with civil law as well. The panel consists of a number of family law lawyers in the Sault area. Basically that is what they are going to do. They are going to hear, they are going to act as pre-triers in effect. I think it is a great idea. It will be interesting to see how it works.

Mr D. W. Smith: Did you say a number of lawyers would be pre-triers? Is that what you said?

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Mr Blair: They have established a panel made up of lawyers, in the Sault Ste Marie area in this case, who are familiar with family law. And those lawyers are going to sit, in effect, as judges who would pre-try the case. Parties will make submissions to them.

Mr D. W. Smith: But still individually, not as the panel?

Mr Blair: Individually, yes. I am sorry.

The Chair: I have a couple of questions to ask and really they have more to do with the mandate of this particular committee on this issue. That is, we are looking to be able to formulate some recommendations as to government policy. It appears as though ADR is a phenomenon that is essentially happening without any overall policy directives, looking at it from the top down. We see the private courts developing, we see the Report of the Attorney General's Advisory Committee on Mediation in Family Law and we have the Macaulay report dealing with agencies, boards and commissions, which have a number of recommendations dealing with ADR and

amendments to the Statutory Powers Procedure Act. We have had a number of the witnesses before us since these hearings have commenced suggesting other government policies and actions, including amendments to the Arbitrations Act and so forth.

I am just wondering, from your point of view, whether or not you have any advice for us as a committee and as a government in terms of how we should approach this whole area as a government policy. How do we pull it together, how do we create some glue to make it all hang together?

Mr Blair: My thoughts on that you will find in the paper that I sent up, starting at page 5 and going through the following pages to page 9. I alluded to this in my opening remarks, but I think it would be helpful for the Legislature to give some kind of seal of approval to the process, to the concept of people finding alternative methods for resolving their disputes other than in the courts. In a sense that, in itself, is just symbolic, but it provides the kind of public comfort that may be necessary to get over that initial reluctance of people to accept a new concept.

I think as well that it would be helpful to amend the Arbitrations Act to define a little more precisely who is included as an arbitrator. The Arbitrations Act does not say who an arbitrator is. It would be helpful if there were a preamble, for instance, to the Arbitrations Act which set out a purpose, and that purpose would involve the resolution of disputes in a timely and effective manner outside of the normal court system. The Legislature could come up with better language than that, but an indication of the stamp of government approval on the concept and an amendment which would indicate as well that more than the traditional arbitration procedure is contemplated in the Arbitrations Act.

In fact, that is the case now because any time parties make an agreement to submit their dispute to somebody such as an adjudicator in the Private Court, that is a submission under the Arbitrations Act and it brings in all those proceedings, including the enforcement procedures of the award. I know that because I am a lawyer and I can read the Arbitrations Act and realize that; the public does not necessarily know that. So even a slight amendment to the act which would make it clearer that it encompasses more than just a traditional form of arbitration would be helpful, particularly if it were coupled with a statement of the Legislature's intent that there should be more resort to this kind of process.

More specifically, I think, as I said at the outset, that it may be helpful to amend the Courts of Justice Act and the rules to provide that a judge may have the power to impose ADR on participants in the legal process within the court system, to force or to compel litigants to try to find another way of resolving their dispute outside of the court system and thus create more room within the court system to deal with other matters in what I have called a reference-like sort of procedure. That needs to be fine-tuned a little more, but it seems to me it is a workable concept. In that sense, ADR becomes court-annexed. There are questions about whether it should be voluntary or whether it should be mandatory. If it is court-annexed, should public funding be made available in order to provide the structure to all litigants? One of the things that follows from that, I think, is the loss of privacy and confidentiality which is attractive to a lot of business people, but balanced against that is a method of streamlining the court system. Those are things that I think can be done, and it would be helpful if this committee would consider doing them and consider whether or not recommendations should be made to the Attorney General in that regard.

The Chair: I guess, in a sense, your recommendation for court-annexed authority for the ADR process is very similar to one of the recommendations of the Macaulay report basically saying the same thing for agencies, boards and commissions. Presumably you would also agree with that recommendation for agencies, boards and commissions.

Mr Blair: Yes, I would. I met with Mr Macaulay and told him that.

The Chair: Gordon Henderson was a witness a couple of days ago, and of course you are aware of the fact that he is a past president of the Canadian Bar Association—

Mr Blair: Indeed I am; a remarkable individual.

The Chair: —and is very interested in this whole area. He made a recommendation that the government provide a framework for ADR and, upon questioning, he indicated that it should be a legislative framework. He indicated that it should be analogous to a self-governing body such as a law society or college of physicians and surgeons, basically to ensure that the process is maintained at a minimal level. I guess also that there would be a certain accountability to the public, particularly in some areas where people would be perhaps less sophisticated in terms of

the law and the procedures such as family mediation and maybe Small Claims Court matters and that sort of thing. Would you agree with that?

Mr Blair: I guess I would agree with it. I am not sure I understand the concept fully.

The Chair: He did not expand on it in a lot of detail, but he did indicate specifically that he would suggest a self-governing body to oversee the whole area of ADR.

Mr Blair: I would have to think about how that would work and how it would be set up before I can respond to it.

The Chair: I appreciate I am hitting you cold with the question and it may take some contemplation.

Mr Blair: I like the idea of a legislative, governmental framework that promotes ADR and that promotes it in a context other than the commercial law one that I have been discussing here today. Whether or not a self-governing body like a college of physicians and surgeons or a law society or any one of those societies is the way to do it, I would have to think about.

The Chair: Another question, to change the subject a bit: Bonita Thompson indicated that one of the problems that she saw was that a lot of people get into the arbitration procedure and then back out of it and go into courts and there are almost two parallel possibilities at every step of the way. She thought that this was not positive and that there should be very, very limited access to or intervention to or by the courts in the arbitration procedure. To what extent do you think the courts should be able to intervene in the arbitration process once people have chosen that particular vehicle?

Mr Blair: Not at all. I agree with her. I think that once parties agree to submit their dispute to private adjudication they are stuck with that, subject to the appeal rights which may go into the public system. At Private Court we have had cases go in the reverse. In the Private Court we have had cases come out of the public system after, say, the discovery stage and be determined at a hearing in Private Court.

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The Chair: Are there any further questions on the part of any of the committee members? If not, Mr Blair, I want to thank you very much for your brief and your presentation today and the answers to our questions. I am sure that they will be very important to us in our final report, our submission to the Legislature. I want to thank you on behalf of all the members of the committee.

Mr Blair: Thank you very much. I appreciate coming and the opportunity.

The Chair: I would ask the next delegation to come forward, please. The next delegation is from the Arbitrators' Institute of Canada (Ontario) Inc.

I would indicate at the beginning that you are not restricted in any way in the subject matter to any particular aspect of ADR; it is wide open. Feel free to address any aspect of it and certainly we will have some questions and answers afterward. We are in your hands. You can take as much time in terms of presentation as you need or you can open it up at any time for questions and answers.

ARBITRATORS' INSTITUTE OF CANADA (ONTARIO) INC

Mr Wilkinson: My name is Harold Wilkinson. I am the president of the Ontario section of the Arbitrators' Institute. I would like to introduce the others. On my left is Wallace Beaton, who is our treasurer and also the principal author of the brief that you should have in front of you; I assume that it has been distributed. Mary Satterfield has been responsible in large part for the family law plan that we have developed. Norman Sherman is our executive director. Gordon Donnelly is the vice-president of our institute and responsible for arbitration development. He is what you might call our research and development man. He is a labour arbitrator and has been responsible for some of the development work we have been doing.

I want to emphasize at the beginning that we are a not-for-profit, professional institute of trained arbitrators, that we are recognized by the American Arbitration Association and the Chartered Institute of Arbitrators in the United Kingdom as their counterpart in Canada. The more detailed description of what we are and who we are is found at the back of our brief. I assume that this has been distributed.

We have been around since 1974 and we have been promoting arbitration ever since. We would like you to regard us, therefore, as a resource from which you can obtain knowledgeable information of experience in arbitration. We would also like to assist in any way that we can with any activities which promote arbitration as a means of settling disputes.

We are particularly concerned, in any new legislation that comes along, with the public perception of neutrality of the arbitrator. One of the tendencies seems to be that as soon as a new piece of legislation comes along, the first thing

that happens is that we suddenly have to have a new bureaucracy to handle those cases.

In particular, we are concerned about the process by which the arbitrator is selected and from where he comes. Ideally, that arbitrator is chosen by the parties themselves. In our case we would supply a list of, say, five names, and when the parties have selected one of those—the usual process is that they indicate back to us the order of preference of the five names when we have got the *curricula vitae* to review—we will then tell them which one of those five was the most acceptable to them by a scoring system that we use. That being the case, then the parties have chosen their own arbitrator and are more inclined, or should be more inclined, to accept that particular arbitrator's decision than if the arbitrator was imposed upon them from above by some procedure.

We feel the neutrality and the competence of the arbitrator is an essential feature for the acceptance of arbitration as an alternative dispute resolution process. This has been the primary function of our institute for some time and we are interested in remaining active participants in whatever fashion we are given. We are quite prepared to work on a not-for-profit or break-even basis to provide the services that we have been providing, or additional services, as the case may be. We feel that in such legislation it is in the interest of the government to allow arbitration to remain essentially a private sector function and to keep somewhat at arm's length from the actual problems of arbitration itself.

We realize that it should be to some degree supervised by government. That is desirable and necessary, but when it comes to selecting the arbitrator and that part of it, it is desirable for the government not to be the persons who have to take responsibility for it or the blame for it, as the case may be. By its nature, in every dispute there is always somebody unhappy at the end because he was not satisfied with the result. If that means that the next thing they are going to do is complain to their MPP or to the minister or to everybody else on earth, it is not desirable or reasonable for a government to take the blame. It should be something that is part of the system and is accepted as part from the beginning.

What I would like to do is ask Wallace Beaton, who was the primary author of the brief that you have in front of you, to lead you through that brief. We would be happy to accept questions at any time on any subject, so if you have got a question, just speak up.

Mr Beaton: I think it might be useful for me to say that, aside from who we are and why we are here, when it comes to asking questions and perhaps satisfying yourselves on some points that may be concerning you, it would be useful just for you to note that I think the five of us represent a pretty fair range of work experience and expertise in arbitration.

Mr Donnelly's field is labour, labour relations. Mrs Satterfield's field is family law, in which she is very deeply involved. Harold Wilkinson is in engineering and construction, and I, if I may use the term, am a commercial jack of all trades. So among the four of us, not to mention Mr Sherman, who is also an arbitrator of considerable experience in addition to being our executive director, you really do have some people who I think have been there. In my own case, this is my 39th year as an arbitrator, not that I was anything but an occasional one in the first 20 years, but you do get a point of view when you live with the development and growth and the variety that goes into the arbitration process.

I think I might usefully make another observation. I expect that there is no group that is closer to the key problems of society as they exist right at this moment than your committee. The reason I say that is that alternative dispute resolution as we are looking at it here is in the middle of the subject. Up and beyond, we have a world where people are in difficulties because they have not found sufficient and sufficiently efficient dispute settlement mechanisms. Eastern Europe is a problem in ADR. At the other end of the scale, we have a proliferation of functions in society, which is a very serious problem, which is not going to be solved except right down there in the educational system. If kids are not learning the ideas that go into dispute resolution when they are at school, it may be too late for them to have a fair, full, proper, functioning dispute settlement society as they go on.

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So we sit here in the middle of a problem that goes right from education in the tender years to the same problems that are created by the history of political disputes in countries far away. I do not know if that notion is helpful for you, but if you do this kind of work all the time, you read the newspapers in those terms, you consider the problems of society in those terms, and that is one reason why we have ventured to label our brief Alternate Dispute Resolution in an Orderly Society, because in the creation of an orderly society, the functions that some of us are called upon to do from time to time really do go to the

needs of social order. I hope that observation is helpful to you, and I think it is a fair perspective of where we are in the kaleidoscope of world activities.

We have a summary here at the beginning of the brief, and obviously we have a lot more to say than we have said in the summary, but I do think these are among the salient points, although there are others that may concern you more as we go along.

One of the oldest dispute settlement methods in the world is arbitration. It goes back to early history, earlier than biblical times. As Harold Wilkinson told you, we are aware of what our fellow arbitrators are doing in England and the United States. By comparison with them, the ADR processes are underutilized in Ontario at the present time. I think that is a fair observation.

Nevertheless, it is going on in many fields that you have never heard of, such as authors' disputes for credits on television. There are dozens of fields that each have their own industrial or trade devices for the settlement of disputes and they work very well in some areas, and some that we do not know much about. We do not know anything much about patent disputes, because they never do surface. They are a totally private kind of dispute, and I think perhaps you heard from a leading arbitrator in that field yesterday, Mr Henderson.

We are voluntary and nonprofit. Our field is education, training and accrediting arbitrators, and the establishment of standards of ethics in practice. We are into public information, and our public is very often parties who are faced with disputes and are testing the air as to what alternatives they or their lawyers have, and we do provide a constant flow of advice to people who have arbitration problems.

We maintain an office with full- and part-time staff to deal with the public's inquiries. We are limited as to what we can do because we are limited in our finances, because our sole support rests with our members. We have a small group of corporate members who add to our ability to deal with these things, but you might almost say that each function has to pay its way in the range of things that we do.

The process is appropriate to deal with certain aspects of litigation that would be feasible to transfer from the courts to private resolution. Everyone says the courts are overcrowded. Five years ago we were pointing, with some sense of warning, to the fact that cases can take 50 months to go through the courts in the United States. I heard somebody say the other day that they are

now taking more than that here; at least a body of cases is. You probably have heard more on this subject in your proceedings already.

Disputes as to quantum lend themselves to arbitration, unjust dismissal cases lend themselves to our labour arbitration forums in this province, family property division certainly is the kind of thing that should never go to court because of the delay of time, and the costs, of course, are largely reduced in the process, and insurance claims—these are the most obvious ones—and disputes arising out of government contracts.

I think you have asked us to comment on this, Mr Arnott's letter, and we have endeavoured to do so in the brief.

With respect to the development of fast-track resolution plans to deal with certain categories of dispute, we are constantly trading our experience with groups of people, industrial and trade groups with problems, and seeing what devices can be developed that will be acceptable within that trade or industrial group and how we can assist them in dealing with them if they wish to have us do so.

There are some full-time arbitrators, but most members of our institute are part-time arbitrators. The demand for arbitration is considerably less than the supply of arbitrators at the present time, so many of us are people who do a variety of things, but we arbitrate when we are called upon to and most of us are in a position to adjust our activities to meet very early time demands on us for arbitration.

As Mr Wilkinson has said to you, we are prepared to co-operate in planning new ADR policies and procedures to service the public needs.

I must say this about government regulations. I think we live well by a system of checks and balances, and nobody is such that he is not a little better if his work is observed and checked a bit, so if government is involved in the regulation of certain aspects of arbitration, I think it is a healthy thing. I think that it makes the system work better. I think that, on the other hand, there can be a tendency for anyone who gets involved to become overinvolved, and when you undermine the fact that this is private between parties who choose their own arbitrator, when you try to develop devices that only take part of the arbitration process rather than the entire tried and true system, you can find that you are ending up with some of the problems that you did not need and failing to get some of the benefits that might

have been achieved. Those are some general observations.

In our brief we have discussed the subject in the first few paragraphs on page 1 and page 2. We have said what alternate—or alternative, as the purists say—dispute resolution is, and it is dispute resolution outside the adversarial joust of statutory tribunals or courts. The term "statutory arbitration" really describes the court's sister, not our brother, if I may use the phrase.

Conciliation, mediation and arbitration are the main forms of dispute resolution, or some combination thereof. It is not quite so easy to combine arbitration with mediation and conciliation, because the moment we start doing that, we find that we are violating the rules of natural justice, and that is a subject in itself. I am sure you have heard that phrase recited to you already also.

Anybody can be an arbitrator. They do not have to know anything. They do not have to be trained. Two parties can pick anybody in the world to be an arbitrator under our law, and that is how some of us started. There was a dispute between a retail merchants' association and a chamber of commerce as to who was going to pay for the Santa Claus parade, how much each, and that is how I became an arbitrator. I owe it all to Santa Claus. That was 39 years ago, in a city for which one of you is probably the sitting member at the present time.

Mr Cureatz: What was the city?

Mr Beaton: I think, after 39 years, I am delighted to blab it was Windsor. Does anybody remember the Santa Claus parade dispute? It dragged on for several years before they went to arbitration. We had to bring in an outsider whom everybody would agree to.

I must say this. It sounds rather frivolous, but a good arbitrator, an acceptable arbitrator, is usually somebody who has a few grey hairs. I became prematurely grey at the age of eight.

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Some of the things I have said here really, if you look at them in perspective, suggest that there are a great variety of functions and a great many aspects to arbitration. While each type of arbitration involves a limited number of aspects, when the problems arise, it is a far more complicated subject than some people think. There are no simplistic solutions, but the tried and true structure which has been in place since common-law days really does provide a modus operandi that works very well.

Paragraph 16, the reasons for ADR: It is swift and prompt, relatively inexpensive, private and

confidential, and very narrow grounds of appeal mean that it lends a great deal of certainty to the settlement of disputes. We can increase that certainty, and we have a suggestion on that particular point already before the Attorney General's committee that has been looking at the rewriting of the act

We have then described our own institute here, and also in the last three pages of appendix, which is the Ontario section of the Arbitrators' Institute of Canada fact sheet, as we call it. It gives you another view of the Ontario institute to put beside the next paragraphs in our brief.

We have developed a code of ethics and guidelines of good practice. We have developed the AIC Rules for the Conduct of Arbitrations. I must say that the year those rules came out my ability to conduct a better arbitration improved, simply because the organized wisdom of that committee helped me, notwithstanding the experience that I had, and I urge the AIC rules on everybody. If parties call about an arbitration, I send them the rules before I even accept the engagement. It just gets them thinking along the right lines and it gets them catching up with several points that they might not have reached by the time we have a preliminary meeting, if that is the way we are going about it. The rules are practical, useful and workable and they are a great asset.

Again, the parties can take or leave the rules, too. The parties really are their own bosses. When two people sit down and decide to appoint a referee, as some of us called ourselves before the institute was incorporated, it is whatever they write in their terms of reference that determines what you do.

If the terms of reference are flawed and you proceed with them, the arbitrator can simply say, "No, I don't think I'm prepared to accept the engagement on that basis." The arbitrator has authority—great authority before he accepts the arbitration; he has a different kind of authority afterwards—but it is important for an arbitrator to make certain that he is being given instructions that are really feasible and workable. A little experience there goes a long way.

We publish the Canadian Arbitration Journal for our members and for our friends, our corporate supporters. I think it makes a useful contribution. With part-time arbitrators, keeping in touch is valuable.

I do not want to exaggerate this, but to some fair extent the group of professional arbitrators in Ontario has some of the characteristics of a network. They call the arbitrators they know.

They call the institute if they do not have anybody they know who can give them advice on some aspect of arbitration which bothered them last time or they think may bother them next time or is coming up outside the circle, the bubble, if you want, of confidentiality in the arbitration.

It is a valuable thing to have an association with your fellow arbitrators. It is valuable for us all. I must say that most of us consider we have a professional duty to guide and assist less experienced arbitrators who call us. I had a chap call me from Montreal a few months ago. It was his first arbitration ever and he had a series of five problems. Why did he not call one of our arbitrators in Quebec? Why bother calling someone in Ontario? He felt more comfortable hearing it from a fellow chartered accountant. So there you are. It sometimes works like that.

We have developed a designation for the arbitrators of substantial experience, chartered arbitrator. You will see more and more CARbs in Ontario as time goes on. I think this is an important step in the development of the arbitrators as a professional group.

Arbitrator selection: Harold Wilkinson referred to that. I am not sure that I want to review that section with you, but if you have some questions we would all be glad to answer them for you. On arbitrator selection, I think the two points that Harold Wilkinson made are worth emphasizing. The first is that the arbitrator must be neutral. The other thing is that arbitration functions better if the selection process is also neutral. It is a difficult world for the parties to be going into, and those things which provide them with assurance of neutrality do make the process work better.

Someone has probably said to you by now that there is more than the judge-litigant relationship in an arbitration. Some of us say to the parties: "Because you have chosen me, I am more than just your judge in this dispute; I am also your father and you are my sons. Until this arbitration ends I have a duty to treat you as my sons as well and to see that you go out the door as the friends that I want my sons to be." The purpose of saying that is not just to describe the relationship; it is to enlist their co-operation in a hearing which will be a process rather than an adversary proceeding. "At later stages of the process problems are going to arise and I am going to ask you for your help. Your father will want your help to solve the problems that arise so that we can achieve the second result of any arbitration." This is a very important thing and I cannot emphasize it too strongly. The nearer we get to court litigation or

statutory arbitration the farther we get away from the father-and-son relationship or, if I may, with great respect to Mrs Satterfield, the mother-and-daughter relationship.

We have a discussion of the areas where arbitration is being used principally in Ontario. There are a great many small areas, but some of the larger ones are discussed here: labour disputes, commercial lease renewals—it is almost standard in every lease that has a renewal that it will go to arbitration if the parties cannot agree on the renewed rent—corporate shareholder agreements and partnership agreements, family break-ups. There are examples of kinds of disputes that are solved by arbitration in Canada because they are solved by arbitration in the United States and the industrial practice follows that of our neighbours to the south and the commercial relationships that have grown up over the years.

On page 8 we talk about the Ontario Motor Vehicle Arbitration Plan, which represents one example of government involvement in the arbitration process, the institute providing the selection-of-arbitrator neutrality function and then the arbitrators, of course, providing the arbitration function itself.

We always have to be careful that we do not create a large administrative structure to serve what is essentially a much more important arbitration function itself. Many arbitrators manage the details of their own arbitrations. They make the arrangements, or their secretaries do. It speeds up the process as well when you talk directly to both parties in a conference call and you can get the timetable set well and easily.

Norman Sherman was one of the key figures in setting up the OMVAP procedures and system here in Ontario. I must say that for the imported automobile group for which we serve as the neutral agency it is coast to coast, it is not just in Ontario. Even though it is the Ontario plan, it has been applied across the country.

We are underutilized and there is some discussion of this on page 9. We say, in section 49, that arbitration is fairly widespread and occasional. I think that represents a fair description of the state of things.

1530

The main objective of any ADR process is to achieve—inadvertently if you like, but however you like—a very high percentage of negotiated settlements. In a sense, an arbitration award is second-best. If the parties, halfway through a proceeding, make their own deal and shake your hand and say goodbye, you have really done a greater job than if you had written a brilliant

award because that is the ultimate objective. The parties choose their arbitrator to make their decision only because they were not able to make it themselves. If they can make it themselves, then the whole system benefits. People working it out is really what life should be all about. We are just a backup system and we must see ourselves that way.

We have a low public profile, arbitration has a low public profile, and the reason is that arbitrations take place in camera. The proceedings are secret or confidential. Unless the parties themselves disclose what happened, the arbitrator's lips are sealed. He cannot say, and his award is also confidential. He cannot circulate it, and not many awards ever get into the hands of other people.

There are two ways in which they do it. There are a large number of parties. I think we have cited here the example of the Ministry of Agriculture and Food which has a laid-down arbitration process for the settlement of price disputes between the growers and the processors. It is done crop by crop and it is a very tight process. But having set the law and doing simply the mechanics of keeping the negotiations and arbitration on a timetable, the ministry does not get involved in the selection of arbitrators. The parties must select their own arbitrators and then of course the proceedings themselves. It is an important field. Most of these crop prices are negotiated, which is the result we want to see.

A good arbitration report should be such as to give the parties guidance for the next three years on how they are going to conduct their negotiations. But when a crop like tomatoes does reach the arbitration table, we are talking about \$3.2 million. From the time the ministry calls and says, "When can you be free?" until the time the parties have their award can be as little as 12 days. You compare that with a proceeding of \$3.2 million running through the Supreme Court of Ontario and you have a dramatic example of the contrast that can exist in a well-designed procedure placed in the hands of parties who choose their own arbitrator, who is willing to act at an early date.

I must say this, that I do not know of a better example in the entire range of things that we do than the speed and the conclusiveness of crop arbitrations. I would say this to you, from the standpoint of the arbitrators, that this is a mean discipline. If you are arbitrating tomatoes in one room with four representatives of the growers and four of the processors, and another arbitrator, a fellow arbitrator of yours, is in the next

room and is just starting in on cucumbers, of the nine arguments they are giving you on tomatoes, they are giving him six of those arguments on cucumbers. When those two reports are going to come out, the parties will hold them side by side and say, "Aha." So each of you is held up as an example, or whatever, of what the other one has done.

An arbitrator who has some experience and some competence and who knows how to listen and goes over the issues carefully most times will come to the same decision as the next arbitrator. I must confess that I have not seen any examples yet that conflict in that respect, but it is just as with the court cases: not all judges produce exactly the same decision in every case.

Low public profile: The courts make all the headlines; the arbitrations cannot make headlines because they are confidential. They are in camera and the awards cannot be released. There were 220 parties for tomatoes so I guess everyone has seen that award if he wants to. But the only headlines that arbitration gets are from the baseball players. They have their contracts up for renewal and cannot agree with the clubs and then the papers are full of arbitration. Baseball players are like tomatoes, I might say; it is final choice in both cases.

Legal profession: There are some comments on the legal profession here, and we have a lot of lawyers among our membership, but I think it is a fair statement to say that lawyers are trained to go and are comfortable with going to court, notwithstanding the time and the procedures and everything else involved. They are not quite as plugged into arbitration. From, I think, most of them arbitration gets very little attention at all. If we are going to solve ADR problems in the school system with more education, instead of public speaking we may be having ADR forums in the schools. We have to have the counterpart of this at a more senior level, perhaps in the law courses as well. I leave that thought with you in that area.

Minor monetary civil disputes: You have asked us for comments on that, and we have said that these fall into the kind of pattern that has been established by Mrs Satterfield's committee in the family dispute plan; our current transportation plan, which Mr Sherman could discuss at greater length if you wish, and the Ontario Motor Vehicle Arbitration Plan. These are examples of the different kinds of fast-track plans that can be developed to solve specific areas of what you have termed minor monetary civil disputes. I

hope we have interpreted your term correctly in making those observations.

You have also mentioned public and administrative uses of ADR and we have a discussion here of the benefits for government in putting contract dispute settlement into arbitration. The parallel that we have drawn here is the parallel with international and commercial arbitration. Large companies that are carrying on business internationally have problems with their agreements of enforcement. Because we now have the New York convention for the enforcement of international arbitration awards, you can enforce an international arbitration, enforce the collection in the country of the other party. That is not the advantage; that is just the technical advantage.

The advantage is that with enforceable arbitration in the agreement, the parties can make a tighter deal—better terms, better prices—because they have greater certainty in their contracts. So the existence of arbitration in 100 contracts may only produce one arbitration, but it makes it a lot easier for the parties to develop those other 99 contracts. The same is true with government: if there is an ultimate uncertainty for anyone who is making contracts with the government, then he has a problem because of the uncertainty, and he is going to raise his price to cover it. Everybody has to cover the risks in setting their price in a contract.

I think that a government that puts its disputes to arbitration, even though it has lost some control over the process—because in arbitration you are in the hands of the arbitrator once you go that way. Nevertheless, what you gain in the prices will be far greater than what you feel you lost in the odd dispute that occurs. This is the point that we have made here. I know that Mr Donnelly's former company felt very strongly that its position was being materially improved in that respect. I do not say that because Mr Donnelly said so; I say that because I met one of his colleagues at the Quebec conference three years ago and he said so. I am sure that he could perhaps add a comment or two in that area if you wished.

The concern of the ultimate discretion of the crown is more apparent than real. There are three good reasons why we have referred to those. I think this is in paragraph 74. The proceedings and awards are both confidential, they set no precedents, no award has any long-lasting effect and binding awards can provide useful guidance to government in the continuing development of public policy.

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I think there is a climate of change in the field of dispute resolution. It may be forced on us but it is very much there, and certainly some of the work that we are doing with industrial groups does not derive from anything but the fact that the people involved are tired of the ponderous way of solving problems. They want a faster, more efficient, less costly way. The trucking industry example which we have in front of us at the present time is, I think, typical of what is going to go on entirely in the private sector with respect to dispute resolution in the next 10 or 15 years. I think we will see more and more instances of that kind.

We all think that if government lends its support visibly to the notion that more disputes should be settled privately, and gets behind it in a variety of obvious ways, this will create the kind of climate that will move the activity level of dispute resolution up from the Ontario level now to the level that has been achieved in the UK. They tell me that in the UK there are 39 arbitration societies. Most of them go trade by trade, occupation by occupation. Some of them go back to early maritime problems. There has been an evolution there which goes back a great many years. In some way, we probably will be serving society well by achieving the same thing.

Government recognition, then, will give encouragement and support. We are at paragraph 83. I think too that as alternative dispute resolution goes on the province will get, and should get, credit for having adopted the attitude that it is, as a matter of policy, trying to improve the relationship between parties in disputes. Instead of being part of—what shall I say—the severe face of traditional government, it will be the warmer, friendlier smile of a government which, like us, is trying to recognize that the sons should be having their disputes settled in more of a family, and less of an adversary, atmosphere.

It will take a little money, but we are not talking about the kind of money that builds courthouses and public monuments to the system of justice. We are talking about small amounts of money wisely invested in the changeover in the system, information facilities to assist those who wish to select arbitrators or who must select arbitrators and the things that are related to that.

Combination of action will produce more results than funds by themselves or action by itself. In the same way, we really think too that the combination of your efforts and ours will achieve greater results than our efforts by themselves or yours by themselves. So we really

see ourselves as being—maybe I am putting it too highly—a junior partner to the government in advancing the cause of alternative dispute resolution.

There is the question of transferring disputes from the courts to ADR. I referred to that early on, but I think I can reiterate that everything we know about ADR can be brought into play to achieve this result. It cannot be done all at once and suddenly; it cannot be allowed to go on too long. Every time a change is made, there is a re-education and retraining element in the process that is not just a one-shot thing but a continuing thing. This, I think, is one of the areas where our institute can render perhaps a most substantial service to society, with your collaboration.

I think it is a fair comment that we need a new Arbitrations Act, and we have a few comments on the old act, which has not had anything much happen, so it would seem, to change it in the last 80 years. But it has developed a wart, and not a very pleasant one. That is the Statutory Powers Procedure Act, which really, for those who are aware of what they can do, has undermined the appeal procedure.

An arbitration under the act is 90 days before a Supreme Court judge. That is the route. I must say that it is a hard route for any lawyer and his client to follow. The reason is that the first question the judge has is, was this a consensual arbitration, did the parties choose their own arbitrator? If they did, they have already accepted his decision before they even knew what it was going to be, and the courts are not very much inclined to overturn decisions rendered by a consensual arbitrator. There are a great many cases on this, and as far as I know they all say the same thing.

On the other hand, I could think of some cases where imposed arbitrators have rendered a decision because the parties could not decide, and the courts have had no inhibitions at all about looking through the arbitrator to the material of the case, but the barrier was not there, it was nonconsensual.

So the more consensual the choice of arbitrator is, the more—what shall I say—the narrower the grounds for appeal. This goes back far beyond the written law; it is in the nature of things.

Just as a nonconsensual arbitrator's decision should be appealed on occasion, and more often, it can be appealed too. It may be you can block that kind of an appeal, but at some point or other, justice may reassert itself and the blockage may be found to be flawed. I am speaking in a legal

area now, which is not my area, but I do know that from a practical standpoint, the consensual arbitration is the best because it carries the characteristics of unappealability.

If any of you should be particularly interested in the Statutory Powers Procedure Act, I can give you a four-page submission on that, which is not our subject today, and the Attorney General's committee already has it, but if you are interested, it is available. There are at least nine or 10 flaws in that procedure.

The procedure is this: It is a year to prepare your appeal, and three judges in the Supreme Court. I must say that the shelling the lawyer gets on that kind of an appeal is exactly the same as the shelling the lawyer gets on 90 days with one judge: "Was it consensual? Was it not? If it was consensual, why are you here?" It is a fair question. Some of you are lawyers and I am sure you understand these things far better than those of us who have only the occasional experience of them to inform us.

The Chair: Mr Beaton, I would like you to leave that as an exhibit for us, even though we may not go into it in detail today, so it will become part of the record and it can be considered in our report to the Legislature.

Mr Beaton: Very good, Mr Chairman.

So we urge on you the adoption of a new act, because I think we need it. I think society needs it as well, but I think that we, as arbitrators, need it too, because we do need to have a simpler, better picture of finality in the things that we are doing as arbitrators.

I think that summarizes what we are doing. Your own people have suggested that the criteria of social order are simplicity; certainty and legality and that a new act should achieve these objectives. You probably have heard or will hear from one or two other witnesses on that particular aspect of the matter, so I do not think I will labour it, unless you wish to ask us some questions.

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We have also made some reference to the establishment, at some future date to be determined, with the tempo of change in ADR, I would say, of an arbitration centre in Ontario. This has been the subject of a submission that we did two and a half years ago to the Attorney General. It is also the subject of the Attorney General's own committee. I must say that in making up the committee he had several of our members there as well, so he has been well informed from our standpoint on some aspects of the question. I thought it was a very wise report,

and a very lucid one, and we would all commend it to you very strongly.

They have been very emphatic that this should not be an out-and-out government facility, that there should be as much public input, public co-operation, public support, as can be achieved. This should go perhaps to the financing as well.

We have said to the Attorney General's committee that we, the institute, would be prepared to lend our efforts to a private fund-raising contribution towards the development of such a centre, because we think it is very important and we think that the people around us in the commercial world should think it very important that this centre be, with great respect, more theirs than yours, simply because we go back to the idea that not only should the arbitrator be neutral, but the appointment of arbitrators should be neutral also.

This does not preclude these checks and balances features of a good arbitration structure, but it is a classic example of where these different elements come to meet. They meet in the centre. We would be very happy to locate there, function as part of it, day-to-day preoccupation, public information; all of these support functions that make the work of arbitrators smooth and perhaps more efficient.

In our final paragraph on page 20, we say these are the kinds of co-operation that we would be prepared to give, and we would be extremely happy to do so.

I think it is a fair statement that our attitude is pro bono publico. If you want to put it at its lowest, you can always say, "What's in it for the arbitrators?" I would say various things. Those who are full-time really want to see their occupation grow, but there are a great many people who are arbitrators part-time at less than their normal fee scale, simply because they wish to contribute to the evolution of an orderly society. The amount of time that is spent in arbitration is far in excess of the monetary value of the system at the present time. We have a great many fellow arbitrators who are delighted to contribute this. So we do approach the matter in a "public good" way and we do offer our co-operation. We are extremely pleased that your committee is sitting on this question at the present time.

The Chair: Are there any further submissions from your group, or would you prefer to take questions from the committee at this point?

Mr Wilkinson: We would prefer to take questions.

The Chair: Okay. I have Mr Smith and Mr Furlong for questions, but unfortunately, I am going to have to leave at about 4:15 and I have a couple of questions. I will be giving the chair over to Mr Kanter. I wonder if I can go ahead, with your permission.

Mr Furlong: Go ahead anyway.

Mr Cureatz: That is the first time I have heard a chairman ask.

The Chair: We heard from Mr Blair, the witness beforehand, indicating a strong preference for government action in the area of court-annexed ADR. In other words, in the court process, in the litigation process, the judge, or perhaps the parties, have the option to try, in a very forceful way, I guess, to direct people into ADR in the court system. We have the Macaulay report dealing with agencies, boards and commissions, which makes some strong recommendations to do the same thing, to try to force parties and the players in that process into mediation and conciliation. We sense from the previous witnesses that there is a real, growing demand by a lot of segments of the public in different groups for ADR.

Assuming that the province takes a very strong position to promote ADR through a number of very proactive ways, in your collective opinion, does the system at the present time have the capacity to respond to that type of government action? In other words, can sufficient trained arbitrators, a sufficient number of psychologists, engineers, graduates of business schools, you name it, be redirected into the process to take up that kind of a demand?

Mr Wilkinson: Our answer would be that we have at the moment some 200-odd trained arbitrators to cover a number of fields. Given sufficient lead time and a demand for the service, we could increase that number very quickly.

The point is that most people join our association expecting to get work as arbitrators, but the volume that comes through is not enough to keep them happy. There is an awful lot that goes through that does not come through the institute at all; it happens elsewhere. But if we had work for these people, if there was a demand for the service, there would be no difficulty in increasing our numbers. We do have at the present time a significant number who are underutilized.

With respect to your first comment, if I may, we have had some experience also with judges, say, referring portions of cases for arbitration. That system seems to work fine as long as the judge's instructions are very clear and the

arbitrator is held to do what the judge instructed him to do. The difficulty comes when the instructions are less clear, and the arbitration sometimes does not serve a useful purpose in that situation. As long as the arbitrator knows exactly what his mandate is, it is a good idea.

Mrs Satterfield: I would like to add to that that it seems to me, assuming that it is court-connected arbitration for the moment—and as an aside, it can be either court-connected or entirely voluntary through such a thing as the institute, but back to the question itself—there are two aspects that need to be regarded in order to respond to your question. The first one is the arbitrator's expertise in a particular field and the second is knowledge and expertise of the arbitration process and, if you like, the law governing that. That does not necessarily require a lawyer.

To respond to that question, I think that if there were clear identification from a committee or the government of Ontario as to the kinds of arbitrators and the nature of the expertise required, they could be provided if the demand was noted and the criteria were determined.

The Chair: A number of the other witnesses have referred to suggested amendments or legislation that would require reciprocal enforcement of arbitration awards among the provinces. We do know that in the court process you go through, you have a trial or disposition, there is an order, there is an execution and there are enforcement provisions within the court system. To what extent are arbitration awards enforceable within the province, outside the court system? Second, what is the extent of the problem among the provinces or interprovincially, in the sense of having the provinces respect the awards of each other?

Mr Wilkinson: There is an existing problem with enforcement, because the ultimate enforcement of an arbitration decision is to take it to the court and make it an award of the court, in which case it then has the same stature as an award of the court. It would be very desirable, as we have mentioned in our brief on the Arbitrations Act, to make this a much simpler process than it is now.

The enforcement problem is only a problem if somebody is not going to co-operate, in a sense. We do have situations in which, for example, a lawyer may be not paid—the moneys owing are not paid—and there is a threat made of an appeal, and on the grounds of that, the party that has to pay, and the party that has the bigger bankroll, may well try to negotiate down the amount of the

settlement with the other party. If they agree, then they do not have an appeal.

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I think that is dirty pool. I do not think that is acceptable. Unfortunately, one of the parties that has done that in the past is the government of Ontario. It should not be allowed. The enforcement process should be fairly straightforward and simple and, again, the grounds for appeal should be made clearer.

These are problems with the existing act. The Alberta act, the draft act that is now out there, has limited grounds for appeal—it specifies a number of them—and those are the only grounds that are acceptable. I think that is probably an improvement in the process.

Mr D. W. Smith: You certainly had a very interesting presentation, and I think you have likely covered all the areas, but it seems as though, when I listened to you make that presentation, maybe more so than some of the other witnesses you specify you would like a little government help but not too much government help. It becomes a little delicate balance here as to what you really want.

We heard a witness from British Columbia this morning. You talk about an arbitration centre. Are you thinking along the lines of the Vancouver one? I believe there is one in Quebec City as well. Are those the lines that you are talking about? I believe Mrs Thompson said this morning that she felt the BC government provided about two thirds of the revenues of the budget of the BC centre. I stand to be corrected on that, but I think that is what she said. I am just asking, is this what you are talking about, centres like in Vancouver and Quebec City, or what do you have in your minds?

Mr Wilkinson: The idea for the centre first came when the Attorney General mentioned it in a speech that he made at our annual meeting some years ago. We have been following this concept with some interest, because whereas we told him it was going to be an international centre, we thought the international centre would have some difficulty getting business in the first several years, as has happened in BC, Hong Kong and other places, but there was a big demand on a domestic basis for assistance, and furthermore, there was no centre of information or place where people could find out what they needed to know on how to proceed with an arbitration, because that is a problem. If they had some place with facilities and so forth and a secretary to run it, a lot of these problems would be solved and the system would become more popular. Further-

more, we would be more than happy to administer that centre.

The difficulty is one of money. What we had suggested was that we could make it a self-financing operation, with the possible exception of rent, based on the normal charges we could figure out at the time. That was where the whole thing sort of fell down. They said, "Self-financing is great, but it has to be totally self-financing, and the government might think of seed money," but that was it.

On that basis, the thing has been sitting on the shelf, though it was discussed in the Legislature and all parties thought it was a great idea, as was recorded in Hansard. We are still waiting for some further developments in the area. Certainly we are ready, willing and able to help.

The institute does not have a big budget. It survives largely off members' fees and some service fees. We just do not have the kind of money necessary to put together this kind of a project, although we think it is very desirable and necessary.

You mentioned the question of help versus no help. In the area of setting up a centre, there is certainly the seed money necessary. Perhaps some assistance with at least facilities, if not operation, would be desirable, if that is to be the direction that we are going to go and if that is what we are going to ultimately achieve.

There are other areas where government action could increase the volume of arbitrations that are taking place. It is a case of which came first, the chicken or the egg. We cannot get members in various fields until there is work for them. If there is work for them then we have all sorts of members, we also have a bigger through-put of cash and we have a greater ability to do more. When we are in a limited-cash position, there is a limited amount we do. We do reasonably well with the budget we have, but we could do a lot more if we had more. We have not come around asking for money; we are just saying if there were work, we could do better.

So how do you get more work? There are two aspects of help we can think of from the Ontario government which are not going to cost that much. One is that the Ontario government departments themselves could use arbitration as a preferred method of dispute settlement, bearing in mind that, as it says in our brief, the results are nonbinding. They are binding as far as that case is concerned, but they do not set a precedent. They resolve that dispute and they do it quickly. They save time and money, especially senior staff time, and the result is final. It is desirable

from various respects. So the Ontario government itself could take a lead by saying, "In disputes we have with citizens or with businesses or with whomever, we will prefer arbitration as a means for settling these disputes." That could be one very good way of increasing the volume of arbitrations and increasing the profile of arbitration.

Another good thing about it is that instead of having to bring it on like that, where suddenly we have 1,000 cases a year where we did not have that many before, you could increase it more gradually by bringing this in as a policy that develops over a period of time, and the cadre of arbitrators capable of handling these kinds of disputes. "Come on, you can tell us, all right now, in six months or a year we are going to start using this kind of dispute." So now we get busy and we develop that cadre of arbitrators necessary for that class of dispute or the other one. We can develop it. So that is one good way.

Another way: All arbitrations that are there came about, not because people necessarily thought this was the best way to go about it, without having thought about it before. They came about because there was some kind of incentive to go in that direction. Either that was the customary practice, as in labour arbitrations—I mean, everybody goes to arbitration for labour, so, fine, that is their customary practice. The same is becoming the case in lease renewals and that kind of arbitration. Yet there are others where it is encouraged by legislation. A typical example of that is this no-fault legislation that is in the process of being discussed. Where legislation encourages it, then the volume is going to suddenly increase because you have legislation that says so.

The problem is, if you are going to bring the legislation in and then suddenly, boom, we have to go from zero to 4,000 arbitrations a year, that is a little difficult to gear up for just overnight like that. But give us a little time and we will make it. And it is there. It does not necessarily mean the government has to come in with a lot of bucks and a lot of heavy stuff to get the thing going. Allow the natural system that is out there to develop of itself.

Mr D. W. Smith: So maybe at the start just to say, as a government, that we think this might be the way to go in the future and just get it started rolling and maybe, say, in two or three years we intend to have 10 per cent of the cases done by arbitration, and send the message out. Maybe that is all you want to start with.

Mr Wilkinson: What we are saying is, we can handle 10, 20 per cent, whatever you say. What interests us is the total number of cases you are going to do of what type. Suppose in the construction field, between the various departments that handle construction for the Ontario government, you might have 300 cases coming up in the next year. We could handle that today. We have the personnel there. Everything is ready. It is just a matter of going ahead and doing it. If you wanted to go into some other fields where we do not have as many people available, the thing is that you check with us. We will soon tell you how many we have in a particular field who are experienced in that field and willing to handle it.

I think the process that is best here is we have been working on the idea that in every case where you go to do something like this, like the transport plan that we have developed with the Canadian Transport Lawyers' Association. The concept is that we will have the panel of arbitrators that is proposed by the institute. It is vetted by a committee of users and they would say: "Okay, yes. We think these people who are on your panel are okay." After that, that becomes the panel from which you select the arbitrators for the next year. But when the call comes for an arbitrator, we take the next names on the list and from those is chosen whoever is going to handle the case.

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The process can be very simple and cost-effective. It is just a matter of making sure that there is the volume there to use it. In that particular case, yes, the plan has been in existence for some months now. This is a national plan that goes across Canada. We have some cases going on right now in Quebec, some in British Columbia. Gradually, as the people who are the possible participants in it hear about it, they become more interested and they are going to use it. It would go a lot faster, though, if there were some incentive apart from just the free choice, to say, "Hey, we're going to benefit if we use this."

If the courts were reluctant to take quantum cases, for example, if the courts were to say, "This is a purely quantum case. There's no item of law at stake. There's no good reason for this to be taking the time of the court. This should be arbitrated, or this portion of it should be arbitrated," that is a good way, first of all, of relieving the backlog in the courts, but it is also a good way of having the volume of arbitration increase. These are not matters that necessarily

take a lot of bucks or whatever, but it is certainly something we can work together on.

Mr D. W. Smith: In my short term of being a member, which is not quite five years yet, the cases that almost blow me away are divorce and custody. To me, if you could not get those into a calmer setting where there are not so damned many people involved—jeez, the stories that people come to me with. I will admit I usually only hear one side of the story, but to me there would be some start there unless your name happens to be somebody who has \$10 billion behind you. Then maybe you want all the publicity in the world, but to me, divorce and custody would be areas that I would think maybe the government could move on.

Mrs Satterfield: I would certainly like to respond to that, because I could not agree more. I am a matrimonial lawyer with another hat. I also do mediation of matrimonial disputes on referral from other lawyers. As a general comment, the courts, with all due respect, are the worst way in the world of resolving matrimonial disputes, for many reasons. Probably the major one is that there is an overlay of enormous personal investment and there is the relationship aspect.

The second thing is that where there are kids concerned, and even where there are not, people have to have an ongoing relationship. They have property to unwind. And custody, access, support, the matrimonial home, those kinds of things are really very, very amenable to arbitration. The kinds of arbitrations that I have done, matrimonial ones, come from other lawyers who say, "Oh Mary, get this out of my hair." With all due respect, either they have agreed to mediate or they say: "Look, this is not a mediation one at all. They cannot even talk to one another. How about arbitrating?"

They tend to be of three classes. They tend to be a dispute that is fairly fresh, that needs to be resolved fairly quickly because they have to find out where the kids are going to live, for example, and what is going to happen to them right away. That is one.

The second one is pursuant to a domestic contract, a separation agreement or some kind of agreement between the parties that needs to be varied because there is a change in circumstances. If you are going to court—and remember, those fees are paid in after-tax dollars by both parties—you are looking at a fairly simple motion at \$1,500 a head as a very conservative estimate. Then, because it is adversarial, out comes the nasty stuff on both sides. That is another group that is very amendable. For example, if they have

joint custody and Dad moves to Nova Scotia, they just cannot decide how the access is going to be varied and how they are going to work that one out. They can continue to consult.

The third one is pursuant to something that is already a judgement, and instead of going back to court to fight because they already are quite scarred by the experience, they want to vary a particular clause or they want to add a particular clause.

Mr D. W. Smith: The kids have gotten a little older.

Mrs Satterfield: Or the kids have gotten a little bit older. You know, the most frequent one other than money is that you get teenaged kids where they are proposing the residence. I think anyone who has had teenaged children knows exactly what we are talking about, that the relationship seemed to be better with parent X than parent Y, but they cannot figure out how to work out the logistics and the sort of money that is involved, the transfer of spouse's support, the residence and those kinds of things. Very often it is the nuts and bolts that are a difficulty.

Those are the kinds of things in the first instance that are really amenable to arbitration. They are amenable to mediation if they can talk with one another, but very frequently they will have already talked together for a little while, or through their lawyers, and the dispute gets hotter rather than calmer. That is the kind of thing they would submit to arbitration. It is a fairly simple process.

There is the other one where you are talking about people with large amounts of money. They are decidedly in the minority, and there is a group of arbitrators who are among the most distinguished members of the family bar. I am talking about people like Phil Epstein, Burke Doran, Doug Stewart and so on, who will arbitrate the whole thing, almost like a private court. Judith Ryan was the chairman of this committee. This is the kind of thing that a group of us do a fair bit of, people like Frank Corner in Hamilton and Judith herself, and people who also work as mediators but never in the same file, incidentally. They tend to pick up the small disputes. They come almost into the same aegis, if you like, as the small commercial disputes.

People really do not want to fight. They do not know how to resolve it themselves. They do not want to go to court. My experience with these is that very often they would use arbitration if they knew about it. The ones that get referred to me are referred by lawyers who have referred previously or by clients who have already been to

arbitration and say, "Look, instead of going to court," and we worked out this little checklist. It is quite simple. Most of them are a half-day, in and out. You write a one-page award. Generally, the parties file those. They agree that it will become a judgement of the court so that they have an amending motion to amend a judgement, for example, a decree nisi or another court judgement. So it is enforceable across the country to respond to that. That is it.

Mr Furlong: I have just a couple of brief questions. First of all, if my friend and I here have a dispute and we want to approach you, what would you give us? Could you walk us through the process?

Mr Wilkinson: I will ask Mr Sherman to answer that. He is the one who handles it usually.

Mr Sherman: To walk you through the process, the first thing you need is to know how to do it. The set of rules is a very helpful primer, the blue booklet that we distributed. Without looking at that, what you need first is to have an agreement that the dispute will be either mediated or arbitrated.

Mr Furlong: Okay, if we have got through all that, do you then provide me with a list or panel of arbitrators?

Mr Sherman: Yes. First of all, you have agreement, because the basis of arbitration is consent; it is a contract. Then, into procedure, we provide a list of five named arbitrators who are appropriate to the kind of dispute you have got. You tell us what you have got going on. We give you the list with *résumés*. Then the parties together choose the particular person to be their arbitrator.

If there is difficulty, customarily what happens is that each chooses an arbitrator and the two choose a third and you have a three-man board that will cost three times as much. We have alternative processes to get around that, where you can send us the names listed and we are authorized to appoint the highest-ranking one as arbitrator, but we suggest to the parties, "Hey, each of you choose an arbitrator," who appoints the third and then backs away and you've got a single arbitrator.

Then we can help with the setting up of the arbitration in a preliminary meeting where you go through the nuts and bolts of how your hearing is going to be carried on.

Mr Furlong: Can I stop you right there? What if we do not like any of the panel of five?

Mr Sherman: We will give you another one. We are not limited.

Mr Furlong: We are not bound by the fact that you are going to present us with a list of five and we must choose one.

Mr Sherman: Occasionally, there may be one in five or six who will ask for more. Usually the reason is not that they do not like them but that their description of the dispute was such that our interpretation of the expertise required was a little out of focus. Say they have a dispute in a construction matter and they see that what they have really got there is a legal problem, so instead of contractors they start to want more lawyer people. Maybe they have a money problem in that same dispute and they start to want accounting people, or perhaps it is a tax aspect of a contract. So they are focusing a little more closely and we give them more lists. That is not a problem.

Mr Furlong: There was a mention in your brief that the selection process of arbitrators should be neutral. I do not understand how that relates to this concept. If we are able to select or if we do not like, we can make a—

Mr Sherman: It comes like this: Anybody whom you will suggest to your fellow disputant he does not like already because you selected him, all right? If he comes from you, you must like him; therefore he does not. So we are the neutral purveyor of these names. That is why. It comes from someplace else, in the classic definition of expert, "the son of a gun from out of town." So we have got these folk and we can give the list to you in duplicate. You can each look at it and they are neutrally purveyed.

Mr Furlong: So you do not function the same way as the arbitrations office of the Ministry of Labour, which says, "If you don't accept these five, we're just going to appoint one." That is not the way.

Mr Sherman: We have got no authority. As I said at the beginning, it is a contract, it is an agreement by the parties.

Mr Furlong: But we could agree to do that then? We could agree to have you do that if we were not satisfied?

Mr Sherman: You could say, "If we can't agree on any of these five, let's let Arbitrators' Institute choose one."

Mr Furlong: The second question has to do with awards. You indicated that the awards were not published, that the process was private and confidential. In labour, for example, you have the labour arbitration cases that are printed and

the cases really serve as precedent in many instances. I am wondering why that would not be the case, even though I understand that it is private and contractual as opposed to the labour field which is a little bit different because of legislation that is in place.

Mr Donnelly: The labour field is a mixed bag.

Mr Furlong: Yes, I appreciate that.

Mr Donnelly: You are referring, I think, to arbitration under the act.

Mr Furlong: Yes.

Mr Donnelly: Or, in the construction industry, grievances that come before the Ontario Labour Relations Board. The bulk of grievances are handled under arbitration systems set up in collective labour agreements and they generally are not published.

Mr Wilkinson: You introduced a subject which has been a controversy between New York and London for 30 or 40 years, because the maritime arbitrators of London, working under the British system, keep the award as private and do not publish it. The maritime arbitrators from New York, working under a different system, publish their awards. The concept in these ideas is that because an arbitrator made a decision and gave his reasons this time, he has been making some sort of precedent. The British concept is quite different, and we follow that line of thinking. Where an arbitrator is there because of the consent, the whim perhaps, of the parties in that dispute, what gives that arbitrator then the right to make any sort of precedent?

Theoretically, and I agree, the concept is that only that person appointed by the hand of Caesar has the right to make a precedent. The person appointed by the consent of two parties has only got authority within that one dispute and thus has no authority beyond that dispute. So whereas you may find that the ideas that were generated in an award may be useful to somebody else, we would work on the fact that the person who made the award, having made several awards, would now write a paper, and publish it in our journal, giving his views on various subjects.

Mr Furlong: So that would become the precedent.

Mr Wilkinson: That would become, not necessarily a precedent, because it is not, but it is an influence, because other people reading that would say, "Oh, yes, that's a good idea, that's a sound concept, I think I'll use that." But it is a much looser process, and it is not as though you are reading an award and have to decide whether this particular case is foursquare with that one

and all those sorts of tests that are used in the court. What we use instead is, we are making a decision which is not making a precedent, and because it is not making a precedent, there is no need to publish it.

Mr Furlong: But surely if you were going to get all of the work that you want, these 300 cases you mentioned that you could handle tomorrow, and if they were all under one subject matter, whether construction or environment or whatever, it would be useful for people who were going to select this process to understand that there are interpretations, whether they be statutes or whether they be contracts, that are somewhat similar in nature. I cannot imagine—we will put it this way: I do not know how you work or how the arbitrator from your institute will go and produce his award. I do not know whether it is done at your offices and you hold a whole fleet of awards that you could go and refer to and use as a library, but it would seem to me that there would be some usefulness in the precedent whereby somebody could look at it and say: "Gee, somebody has already made that determination, and if we go to arbitration, we're probably going to lose. We'll settle it right away. We won't even go through the arbitration process."

Mr Wilkinson: There is a school of thought that goes along with your thinking, but there is an equally strong and perhaps stronger school of thought that says, once again, that the precedent can only be made by he who is appointed by the hand of Caesar. If that is the situation, then this arbitration process should not set a precedent.

Besides that, there is also the concept that just because some decider of fact or arbitrator made a mistake somewhere back then, why should that mistake necessarily be perpetuated? Why should the new person coming along and looking at this case all over again not look at it with a fresh slate and say, "Okay, I'm going to interpret this as I see it"?

There is another fact—

Mr Furlong: Could I just interrupt you there for a moment? If that were the case, surely at one stage you would go to the next process and take it to court and have the issue determined. Why do you want 15 different people arbitrating the same point if they are going to go 50 per cent one way, 50 per cent—

Mr Wilkinson: Once we have a decision of the court and that decision of the court is presented to the arbitration as part of the argument in that arbitration, then the arbitrator has to have a look at it and see whether it is going to apply or whether it does not apply. That is fair

enough. The judges have the duty to set precedents; the arbitrator does not.

Mr Beaton: There is another point here to contemplate, though, and that is that if you have these published awards, then you now face the question of, should you then not have a more full-fledged appeal system to go along with them? The publication of the award carries with it the—that should logically be then appealable as well.

So by gaining the thing that you have described, and there is a benefit—I have seen this in the agricultural arbitration; it is a real benefit—it also carries with it that penalty as well. What you perhaps get in opportunities to settle before you reach the decision and award, you may lose in the loss of certainty in the process.

There are some fields in which having those shrouds taken off the award are a great benefit. The one I cite is the best one I can see.

There is one other aspect, too, and that is that I think we would be writing a little bit differently if we were writing for public dissemination as opposed to the accomplishment of friendship between these parties.

If it would help you—I guess I am talking out of school, but I think it will help the committee—I discovered that there was not a problem in financing the Santa Claus parade. I discovered that there was a personality conflict, and a mean one, between those boards of directors. But there is no such thing as a personality conflict, let alone a mean one, between two boards of directors. What you have are one or two guys on one board and one or two guys on the other board where there is a mean conflict. That is all. They are surrounded by a group of people who are looking for a darned good excuse to become friends again and perhaps circumscribe the activities of these two people and their whatevers, so the thrust of all the work of the arbitrator is towards solving both of those problems. If that award is not couched in friendly language with what I would call good old-fashioned folksy common sense, the old aphorisms, if you like, you are going to fail no matter how clever your award is.

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Mr Wilkinson: One more point in that respect is that if I am writing an award for public consumption, it will take me more time, more care, more thought and the end result is going to cost more, and somebody has to pay for that time. The objective here is to keep the cost of the arbitration process as low as possible.

In the labour field, I have heard several people argue that 20-page reports by an arbitrator, which

are costing them far too much at \$1,500 a day that they pay the arbitrator, are not worth the effort, and they are arguing that these things should be discarded.

Mr Furlong: I would agree with you on some of them that I have seen.

Mr Wilkinson: But I would just say that if it is going to cost more, it is not a benefit.

The Acting Chair (Mr Kanter): I think that question has provoked others who may want to respond.

Mrs Satterfield: Very quickly, as I know Mr Sherman would, there are two aspects, I think.

One is that what you are looking for, I believe, is some degree of consistency in awards. Two factors are operative. Your arbitrators in particular areas really are experts and, whether they are lawyers or not, keep pretty close track of what is going on, what the range of awards is and what is reasonable within the law. That is certainly my experience in my field. I am married to a labour arbitrator and we keep very close tabs on what the law is generally. That is the first aspect.

The other is that there are never, never two circumstances that are identical. Certainly in my field, and in the commercial mediation field where I work, each set of circumstances has its own glitch which does not fit comfortably into the four corners of a long written award. I know that for private arbitration we tend to do one—two pages is long—to set out the circumstances and the evidence we have considered, the submissions of the two parties and the award. That tends to be fairly standard among the group of matrimonial arbitrators or the labour arbitrators who do the private interest, single-issue kinds of things. So I think those are the two considerations.

The Acting Chair: Mr Sherman, do you want to add to that?

Mr Sherman: Yes, just a crumb. When you are looking at an award that is going to be public—and the judges do, because theirs are not only public but they are stare decisis, they bind—I think you have to look at public policy and you come into the concept that hard cases make bad law, which I think means that you are going to have a tough decision, whereas in an arbitration you are looking at the parties, their dispute, their problem alone, in the context of what is going on. That is all you have to decide. It does not matter if another time you yourself would make a different decision with different people. As Mary Satterfield says, it is their problem, arising out of their

situation, that you are dealing with. So it is better that it is a private award and it is not published.

In truth, as a lawyer, I look at these things and I think, how can I advise my client? In the court I say I have a view of predictability of result because I can read the cases and in the arbitration I cannot. Yet I know equally that they must follow the law and they must follow the rules of justice, they must follow the rule of equity, so they cannot go far afield, but they will be closer on the fact. They will be closer on the way business is conducted, if it is commercial, they will be closer, if it is a family matter, to how the family would have resolved it if it could, so I would rather they were not recorded.

That is a side issue to whether or not you put reasons in your judgement so the lawyers can grab them and appeal them. We do not say as much in the award, so if you published it, you would not learn that much.

Mr Beaton: Could I say one more thing, just to put it into another perspective for you?

The Acting Chair: Certainly.

Mr Beaton: If my awards had been published over the last 16 years, I would have done five times as many arbitrations as I have done, so I have no vested interest in seeing the awards stay under wraps. Published awards really do attract people to call you to resolve disputes, so I think it is an unselfish observation that we make when we say they should remain confidential.

The Acting Chair: Mr Furlong, your last question certainly attracted a great deal of interest on the part of all the representatives here.

Mr Furlong: I would like one more. In order for you to succeed, I guess, in getting the process in place where arbitration is going to be an alternative dispute mechanism, the reputation of the arbitrator obviously has to be front and foremost. You indicate in the brief that you have been involved in the education, training and accreditation of arbitrators. Do you do any training other than sending them out on the job?

Mr Wilkinson: Yes, indeed. We have two courses that are offered by our institute through the extension department of the University of Toronto, known as arbitration 1 and arbitration 2. Each is 10 weeks in duration and there is an examination at the end. We also have a correspondence course that is offered nationally for those people who cannot make it to the University of Toronto. We would offer the same courses in other jurisdictions if there are 20 people or more who want to take it, so yes, that exists.

By the way, we are already in the business of arbitration. We have been there since 1974. It is just that the volume development has been slow. Of course, that is partly because—and it would not change no matter what happened—people will go and select their own arbitrator without coming to the institute. It is only those who come to us looking for assistance in that matter whom we hear about. That number would increase greatly, we feel, if the concept were encouraged.

Mr Farnan: My question is a little bit along the same lines, and maybe you could bring me through the process. It is the payment of the arbitrator. From the time the first contact is made, what are the things that the arbitrator is paid for? Is it standard? What are the checks and balances that will ensure that the arbitrator is not milking the system unduly? Obviously everybody's reputation is involved. I think that would start it off.

Mr Sherman: Could I speak to that? Basically the arbitrator is paid for time, so from the time that he starts to become involved the time clock is running for cost to the parties. If the Arbitrators' Institute of Canada can be involved, the time is at a much lower cost because people working at a much lower hourly charge are involved in things like setting up appointments. To set up an appointment with three parties, in my experience, takes nine phone calls, "Sure," "Yes, I can," "No, what about that day?" and then around the robin again. So for the first meeting there are nine phone calls, and maybe 12.

If the arbitrator does that, he has wasted an hour there. If the secretary does that, it is an hour still, but her—or his—charge is lower. I do not want to be sexist here. Their charge is lower, and consequently it is a less expensive process.

You asked about arbitrators' costs. Commonly they would be agreed to by the parties when they took the arbitrator on. One of the things they would ask him is: "Are you available for these dates? Do you have any association with the parties so that you could not be neutral? How much do you charge?" That is a perfectly fair question, and if they do not like the price, they can go out and take somebody else.

In my experience, the prices are roughly like lawyers' hourly charges. They are someplace between \$100 and \$200 an hour, engaged in the time that is clocked. That is not the time walking from here to there, but the time that he is actually working on that particular dispute, noting down the time from first contact to setting up the first meeting to attending the first meeting and the process of how the arbitration is going to be

actually carried forward, the nuts and bolts, which takes maybe an hour, an hour and a half, depending if it is complex, to arranging the hearing date.

Once again, the domestic process of finding the hearing room, setting up a secretary or recorder if you need this type of thing, fielding that date to see if it is an acceptable date with all parties, 12 phone calls maybe, arranging for translators if this is necessary; this kind of homework can be done by less expensive people.

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Equally, when the arbitrator does it, your time-clock is running. The hearing commences, it is carried through, there are that many hours. Subsequent to that, the arbitrator has to write his award and that takes some time too.

You asked further questions. How can you be sure that the arbitrator is not overcharging or is not perhaps puffing up the bill in a way that is out of proportion to the work, that perhaps it is more expensive than was warranted? You can tax the cost of an arbitration exactly the same ways you tax the lawyer's bill of cost. So the taxing officer can have a review of the arbitrator's charge.

Mr Wilkinson: What you have just heard described is at the top end of the scale. We also have consumer arbitrations and other arbitrations which are at the bottom end of the scale. At the very bottom, I think we have got the Ontario Motor Vehicle Arbitration Plan, which used to pay \$100 per case, and if it is a six-hour hearing, that is not very much. Now they have moved it to \$200 a case, which is still not very much, but that is where they are at. The more likely figure for consumer arbitrations would be in the order of \$500 a case. That is the more appropriate figure; that is reasonable actual cost.

I might also tell you that the administrative cost necessary to set up the arbitration and do all the other things we are talking about—select the arbitrator and what have you—is also \$500 a case.

Mr Farnan: Did I pick this up correctly that each party would have a representative and there would be a third representative, there would be three?

Mr Sherman: No, not necessarily. The preference by far is to have a sole arbitrator. The reason? Why did you have three? The only reason you had three was you could not discard it on one, so each person, because he distrusted the other, appointed somebody. Those persons picked a third. In effect, you have two advocates and an arbitrator, but you are paying four or five times the price.

If you must go the way that each party picks somebody, our recommendation is that once they pick the third, the first two drop out. They have done their job; they have picked the third party. But an easier way that we also use is, we give you five names, and each party gets those five names. You send the five names back to us, listed in order of preference. You have looked at the curriculum vitae, the résumé of each person, sent them back in the order of preference, and we will tell you which one of the five rated the highest.

Mr Farnan: Okay. The other thing is, does your group have a recommended range for costs for arbitrators or is that something that they do, established solely independently?

Mr Wilkinson: At present we do not have an official recommended range. It is something that is under discussion, but it has not been high on the list, because, quite frankly, it has not been a problem.

Mr Donnelly: But we are working on a scheme right now on the labour side.

Mr Wilkinson: Yes.

Mr Donnelly: The arbitrator's fee is going to be fixed. It has not come to the finalization yet, but it will be fixed, so much per case, and if the case goes beyond three hours, so much more for each hour after that period, which I think is the kind of thing you are looking for.

Mr Farnan: Yes.

Mr Donnelly: That is just one area, of course.

Mr Sherman: Same thing in our transportation plan, the same thing in each plan, because we can package it, and then the arbitrator essentially walks in and does the case. He gets a little less, but it is predictable and it is cut down—

Mr Farnan: If the government were buying into a process, you envisage that some time within that period of time there will be a range that will be brought forward, so that we know what we are buying into.

Mr Donnelly: We are presuming that the parties will share the cost, right now, in our scheme.

Mr Wilkinson: One of the problems with the range of arbitrators is dependent on the time. So the other side of the coin which has to be considered is, is this arbitration—the hearing—going to last half a day, say, three hours, or is it going to last three days? You have got to tell me how much you are going to pay me; you have got to tell me how much time you are going to have me for. If you are going to say, "Look, I'm only prepared to pay you \$500," well, for three hours

of hearing, some time to prepare for it, some time to write up the award and so on, that is reasonable; that is probably about \$100 an hour. That is okay. But if I am going to sit for three days, \$500 is not enough; I mean, you are coming down to a pretty low hourly rate. So if you are going to say, "Limit what the arbitrator gets," the other side of the coin is you must somehow limit the freedom of the parties as to how long they can take to argue their case.

Mr Farnan: The other problem with this structure is, how do you reward excellence in the field if you have that range, or is everyone so proficient that they just fit into this range of excellence and therefore deserve a nice reward?

Mr Sherman: We do it in the normal way that happens in society. You get chosen if you are excellent; if you are not, you get left.

Mr Wilkinson: There is another factor, which is that we encourage the newly trained arbitrators to take the smaller, consumer-type cases, such as on that—

Mr Farnan: So there is an apprenticeship system at work there.

Mr Wilkinson: Informally.

Mrs Satterfield: There can be. With us, there are a couple of people who now work as family law arbitrators who can sit with the parties, who sat with me. That is how I got—

Mr Farnan: I am looking at the labour situation, where you have three people. I am sure people learned by being with others and then writing joint reports, etc. But if somebody comes on stream and they have taken two 10-week courses—and I suspect that part of those courses is the practical application of skills—then is there a monitoring function of your board to evaluate? I mean, it cannot just be the passing of the exam. Is there a period of two years of monitoring by the board, which eventually says "Yes, you have succeeded in the field"?

Mr Wilkinson: There is a problem. We do not have enough cases to do that. The person—

Mr Farnan: We are going to solve that.

Mr Wilkinson: I hope so. If we had enough cases going through, yes, we could institute something along that line and would be willing to do so. But the difficulty we have is, if we are only getting five or six construction cases a year, heck, we have got a whole lot of people sitting around twiddling their thumbs, and it may be three or four years between cases if you are just coming through the institute. You may get cases coming from other sources, but just coming

through the institute it would be a long while. So there is little monitoring that we can do at that point. But the concept is fine. If the volume is there and we have to keep track of how our people are performing, we would do something along that line.

The Acting Chair: I thank Mr Farnan for his questions and also his predictions as to what our report might contain.

Mr McGuinty: I cannot think of any questions to ask, but I would make an observation that I think might be interesting, helpful and perhaps encouraging to our guests.

I do not know to what extent you are familiar with the views of those who have appeared before us earlier this week: Mr McMurtry, Mr Kelly, Mr Tannis, Dean Emond from Osgoode Hall, Gordon Henderson and the young lady from Washington who gave us a very impressive outline of how this is working in the practical order. I will tell you my impression, and you might find it interesting and maybe encouraging.

When I first came upon this task—I am not a lawyer; for that I do not apologize; I have been an academic who for well over 30 years taught lawyers at various stages but not within law schools—I was almost despairing that we would ever do much to break down what seems to me to be a kind of monolithic legal structure, almost impenetrable, intractable, with a mindset seeing the focus on the confrontational mode as the norm. I attribute that in part—there are no clear-cut villains or heroes in this scenario—to the training in the trade of law which I think law schools often provide.

I was delighted that a man of Mr McMurtry's position in the legal community put forth that view in very much the same way, saying that he never learned a damn thing in law school, that what he learned of value about the profession he learned from his father. I have the same job with my four criminal lawyer sons, trying to make up for the deficiencies of their training in the trade.

I think this is an idea that is so eminently sane and reasonable. A very beautiful book that Mr Tannis—and I say that not simply because he lives in my own riding, but he has a very beautiful statement here among a number of very fine quotations. It is from Plato's Republic: "For our discussion is on no trifling matter, but on the right way to conduct our lives."

Mr McMurtry made another remark that struck a very responsive chord in my mind when he said simply that, in a sense, the mark of a civilized community is reflected in the ease whereby ordinary people can avail themselves of due

process. I was thinking back over my reading over the years, be it Robert Maynard Hutchins, *The Higher Learning in America*, where he disparages the idea of vocationalism as the death of professional schools, or even in the beautiful play *A Man for All Seasons*, playing variations on the same theme regarding the importance of law, but the human element in law.

So my observation is that, through Mr McMurtry, Mr Kelly, Mr Tannis and Dean Emond—he tells us, for example, that in the last five or six years he has seen a marked departure from this confrontational mindset which prevailed in other days in law schools. He attributes that, in part, to the fact that there is a higher percentage of young ladies there who, I think, bring a kind of sensitivity to this whole issue which had not been there in other days. Mr Henderson has been a friend of mine for many, many years. They are very astute, very active, very mature, very widely respected members of the legal community in Ontario.

We also have had a brilliantly interesting presentation by a young lady who is the chief deputy clerk, multi-door dispute resolution division, in Washington and she told us how, in that area, they bring it into the schools. We are dealing with an attitude here which is systemic. It is rooted in the thinking in the legal mind, and that is systemic, it is in the roots and it bears fruit in attitudes. They are bringing this into the

schools, as I am delighted to hear that Mr Tannis is in Ottawa. Disputes among students: they will set them up as arbitrators and mediators, really a practical lesson in civics.

So if you are not familiar with these wonderful presentations, I would hope, Mr Clerk, that in appreciation for the contributions which our guests have made, if they wish, they could avail themselves of the transcripts of these hearings, because I think that they, as I was, would be delighted and encouraged and certainly much more hopeful than I was when I first undertook the participation in the hearings of this committee.

The Chair: I would like to thank, on behalf of the members of the committee, all of the representatives of the Arbitrators' Institute. Not only was your presentation excellent in its own right, but it brought forth many questions and also some very learned quotes from Mr McGuinty. It is not every session of this or other committees where we have Plato, McMurtry and R. M. Hutchins quoted. It was perhaps loftier than some committees I have been at. I would like to thank you.

I would like to remind members of the committee that we will meeting next on Monday at 2 pm in room 151, so could you please take your documents with you.

The committee adjourned at 1655.

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Legislative Assembly of Ontario



Standing Committee on Administration of Justice

Alternative Dispute Resolution

Second Session, 34th Parliament

Monday 19 February 1990

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers

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Contents of the proceedings reported in this issue of Hansard appears at the back, together with a list of the members of the committee and other members and witnesses taking part.

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Monday 19 February 1990

The committee met at 1413 in room 151.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: Good afternoon. The standing committee on administration of justice is in its second week of public hearings on the issue of alternative dispute resolution. Alternative dispute resolution, or ADR as it is called, covers a broad range of nonjudicial measures for resolving conflicts, including negotiation, mediation and arbitration, private judging, neutral expert fact-finding, mini-trial, a summary jury trial and moderated settlement conference.

CHIEF GORDON PETERS

The Chair: Today the first witness we have before us is Chief Gordon Peters, who is Ontario regional chief and vice-chief of the Assembly of First Nations. Chief Peters will speak of the first nations' view of the use of ADR methods.

Chief Peters, if you want go ahead and proceed, we will have questions and answers after your presentation. Please introduce your panel.

Chief Peters: Okay. As you indicated, my name is Gordon Peters. To my left is Andrea Chrisjohn, executive director of the chiefs of Ontario; and to my right is Sylvia Thompson, who is a policy analyst who works in the area of self-government and treaties within our office.

First of all, I would just let you know that our presentation may be in a context a bit different from the kinds of presentations you may be looking for on ADR. One of the reasons is that we think we have to deal with this in the way we have dealt with it because we need to continue to have people understand that there are some very major differences in the way we resolve problems within our communities and the way that we have been unable to resolve disputes with the governments of the day in accordance with the rights that we exercise as a people in this country.

With that, I will read to you the very short brief that we have and then we will get into discussions. I am sure you will have questions in relation to ADR and its impact within our communities.

Thank you for the opportunity to address your committee and present our point of view. I guess

we have always welcomed the opportunity, regardless of whether it is in front of a committee on education or Meech Lake or the administration of justice. It gives us the opportunity to express our desires as a people, so that other people can begin to appreciate what we have and what we are as a people within this region known as Ontario.

If we had the luxury of time, we would share the history of our struggles for justice within our own land, but I think, for the purposes of this committee, I would like to capsulize the relationship we have had with each other over the last couple of hundred years.

From the very beginning, contact with European settlers and immigrants to Canada went wrong because there was a refusal on the part of the increasingly dominant European people to accommodate the first nations' culture. As we know, no society exists without laws which provide for orderly conduct of living with each other on a day-to-day basis. Our nations had such an order, but it was ensconced within traditions and customs carried out with the greatest of care. They did, in fact, exist.

Our ancestors maintained our governing structures, which were second to none. Our philosophies and inherent relationship with the world around us were based upon a mutual and deep respect, a respect for the natural laws of the world. Included in those natural laws were modern-day conservation practices and advanced environmental protection techniques, and they defined our relationship with other human beings.

With the arrival of the European settlers in pursuit of imperial and mercantile objectives, they had to develop policies and laws to govern their relationship with us, the original inhabitants of this land. Their attitude demonstrated powerfully the clash of cultures. To them, land was and is a commodity to be bought, sold, exploited and pillaged. To us, Mother Earth is sacred.

The policy they developed about our land was eventually expressed in the 1763 Royal Proclamation, which acknowledged our self-government, our internal sovereignty, and laid the formulation for our treaties with the British crown to cede or sell land. We were recognized in the law of the Europeans as being self-

governing nations capable of making treaties with them, and for a time this treaty-making process was followed.

What happened after a while should be known to everyone who cares to find out. Treaties were broken by successive governments of Canada, land was stolen, Indians were fooled and lied to and some of us were killed so that the laws and institutions could be imposed on first nations. Our traditional or customary laws were ignored. We were forbidden, under legal penalty, from practising our ancient and honourable customs and religions and speaking our own languages. In short, there was a premeditated plan designed somewhere between London and the provincial capitals of the federal capital of Canada to eliminate the Indians.

Having ignored or suppressed the customary laws and the justice systems of the first nations, the colonizing governments then imposed their own alien systems upon us. We had alien values imposed upon us. We had an alien culture and linguistic concepts imposed upon us. All of a sudden many features of our ancient, traditional ways of life and behaviour became crimes in those alien systems. Instead of responding and accommodating and coexisting with our legal systems and providing for resolution of conflicts of laws, the European legal systems completely suppressed ours.

Here was a French civil law system in Quebec co-existing with 10 English common law systems in the provinces, plus one federal legal regime, and with the provisions for ironing out conflicts among them, while the customary laws and justice systems of the original inhabitants were ignored and suppressed. Here once-proud nations of people with ancient laws and customs find themselves being torn from their heritage and unwilling to fit themselves into an alien system.

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ADR is the application of the continuation of those 200 years I spoke about.

In the absence of the recognition of first nations' law, federal and provincial laws continue to apply, resulting in continuing injustice against our people. This is unacceptable.

We have seen the extent of the status quo of the Ontario government. We still have justices of the peace who have Indian people enacting provincial laws over our own people. We have a police force in the name of the special constable program, of whom the majority are employed by the Solicitor General, enforcing provincial law upon our communities. We have the circuit

courts travelling in the north, which carry out the administration of provincial laws against our people. We still do not have a mechanism to resolve land claims, land rights and treaties. We have tried arbitration, nonbinding arbitration and even a panel of experts for comments only, all of which have been rejected.

So it becomes obvious to us that there is a much greater need to resolve disputes between ourselves and the government of the day before we even suggest that we should have alternative dispute mechanisms within our communities. Our biggest problem lies in the fact that the majority of our disputes are not internal but, in fact, external. As a result, whenever we continue to exercise our rights and our way of life, we are charged and often incarcerated.

That is the status quo of where we are today. I think in our brief description of the kinds of elements we are dealing with, our first impression is that the ADR, as a basis of trying to resolve conflicts between ourselves and the government, is something that is not capable of working. It has demonstrated in the past that it is not capable of working, and I do not see it demonstrating anything in its new form of being able to work to resolve those kinds of disputes.

If, in fact, ADR is to accommodate us in any way within our communities, I believe that we have to have a much greater look at what is attempting to be resolved in our communities. We have to have a much greater look at the impact of what we are trying to deal with, and how, in the absence of our own laws, those will be dealt with. I believe that over a period of time we can have that very hard look to see whether or not the ADR becomes a potential use for us in determining what kind of justice systems we would like to see, if those are outside and if the ADR is a component that is outside of the court system that we are currently dealing with.

I guess from that point of view, we will leave it for more discussion, and I think we will probably be more able to deal with the questions and answers than we are in terms of trying to find an adequate solution to the major problems that we face.

The Chair: We had a number of witnesses come before the committee last week. One of the expert witnesses we heard from was Professor Paul Emond from Osgoode Hall law school. He made a suggestion that the province of Ontario should give serious consideration to using ADR in native land claims issues as well as major environmental issues.

I am very interested in the comment in your brief here where you indicate that: "We still do not have a mechanism to resolve land claims, land rights and treaties. We have tried arbitration, nonbinding arbitration and even a panel of experts for comments only, all of which have been rejected."

Are you saying there that you have been requesting those ADR techniques to be used in native land claims and they have been rejected? Is that what you are saying in your brief?

Chief Peters: To put it in context, dealing with the province of Ontario in terms of land claims, we know very clearly that there is no policy in the province of Ontario. If there has been one, then I am not aware of it. But to my knowledge at this particular time, there have been no land claims that have been resolved between ourselves and the province of Ontario in the history of the government of Ontario; that is, as long as it has existed.

So from that point of view, you have to understand that when we are saying that we have tried everything humanly possible to get the provincial government to come to the table and to deal with us in a frank and fair and open fashion, which would give us the opportunity to be able to at least have some kind of process—we certainly did not call it ADR at the time—that we could utilize, that would keep us out of the court system.

The current situation that we are faced with federally and provincially is, "If you do not like the scenarios that I have developed, the obvious response is, take us to court." As you know, court is not our particular area to resolve problems, since we have been unsuccessful in resolving problems in that same court system now for close to 100 years. We tried some of these processes and we have not been that successful in being able to even get them implemented, let alone to find out whether or not they would have some impact on any kind of discussions that we could have to resolve those land claim situations.

The Chair: We expect that this committee will file a report with the provincial Legislature and will be making recommendations as to an Ontario policy for ADR, or at least a process for establishing a policy with respect to ADR, which probably will include court-annexed ADR, an ADR outside the court system. I think the committee would find it very helpful if you might make some suggestions to us as a committee as to what ADR techniques or in what context ADR

might be acceptable for your purposes, particularly in native land claims.

Chief Peters: That is a really tough question that you ask me because what it asks me to do is to put a majority of our faith as a people into the existing history of Ontario. I think that is why we said this afternoon that we wanted to capsule a couple of hundred years of our relationship and what it has meant. If that relationship has been taught within a system, if that relationship has been enforced through the courts and if that relationship is reflected in the legislative process in Ontario, we think that it would be very difficult to find people in the process of arbitration who would not reflect those same kinds of values.

If we were to move in that direction to resolve claims, as I said, that would be a tremendous leap of faith on our part. When we discussed that process before, I think that we were under the understanding, through the number of years that we tried to resolve these claims, that we were prepared to deal with any mechanism that we could find to get people to the table. Whether that scenario is totally changed or not within Indian country is very difficult to tell, but I can assure this committee that with the land struggles that we have been involved in in the last few years, there seems to be a growing recognition on the part of our communities that they are prepared to withstand the barrage that is being enforced upon them, regardless of whether it means going to court, regardless if it means enforcement physically by the Ontario Provincial Police or anyone else, that the land that they are claiming is theirs. They are living there and their occupation for the amount of time is the value that they are placing on it.

Right now, I could not tell you fairly whether or not ADR practices would be acceptable at this stage of the game or not because I think that over the last decade we have surpassed a lot of the solutions that were within our grasp at that particular time.

The Chair: Mr Kormos, you have some questions.

Mr Kormos: A couple of questions, and my first one might be seen by some people here as being provocative. I assure them it is not; I am disinclined to ever be merely provocative.

Mr Jackson: Mischievous and provocative.

Mr Kormos: Others have spoken of this, and let's make reference to some of the recent trials and, indeed, tribulations, the litigation that has taken place. Is there something inherently

problematic about the Attorney General also being the cabinet member who should be the spokesperson for native persons in cabinet? Is there something inherently problematic about that?

1430

Chief Peters: Many Indian people have suggested that is a problem, that the Attorney General is mandated to carry out the laws and the statutes of Ontario, and at the same time with that mandate he is in charge of the Ontario native affairs directorate, which under a general philosophy is supposed to be trying to find a way to accommodate the whole question of self-government and the question of aboriginal treaty rights and the application of section 35 of the Constitution.

There is a definite conflict there in my opinion. I believe the two do not go together. If we are going to implement the rights that flow from section 35 that are entrenched in the Canadian Constitution, and define the role that the provincial government of Ontario is going to play, then it is going to be very difficult to do that with the Attorney General because of the role he plays in enforcing the laws of Ontario.

Mr Kormos: I hear you talk about the types of institutions that native people have historically, and even currently, been submitted to. Let's talk about courts. Courts, judges, their clerks, their staff from top to bottom have tended historically to be a whole pile of things, but among some, very white, very middle class and indeed very male. Not only have native people, I suspect, suffered as a result of that, but a whole pile of other groups in our society have suffered as well by this quality of our courts.

Are you saying there is some concern on your part that an alternative dispute mechanism may simply replicate that very same set of standards, however subtle they may become, because of the fact that governments both federally and provincially are making efforts to—my goodness, you know full well they issue press releases, pat themselves on the backs and hold banquets when it is somebody who is not necessarily very white or not necessarily very male or not necessarily very middle class, but oftentimes my impression is that those people are so overwhelmed by the qualities of that institution that prevail that they can do very little. Can you talk about that a little more.

Chief Peters: First of all, in our opening remarks and in the comments we make, we are not trying to paint all the justice system and all the people involved in the justice system with the

same brush. We recognize that there are certain things that have happened to us that are positive in nature in the last few years, but we recognize the 100 years of history that we have as well.

I guess the main problem that we see, and I guess that is something we have recognized, is the staunchness of the establishment that has been here for those many years. If you look at the US system, at what it attempted to do and how it attempted to have as many corner market vendors as possible in the alternative dispute resolution business, when you talk about the quality of justice that is served and when you talk about the quality of the justice in the US, I think a lot of the poor people have categorized those systems as second-class justice.

I think that is we look at it now, that as the first nations of Ontario, we fall into the same category: We are poor, economically deprived and do not have those kinds of benefits, and now what is being proposed within our communities is that same process that in fact in the US they call second-class justice. So there is a definite thought to that when those proposals are being made to us.

Mr Kormos: One final question: As you probably know, there has been a sometimes tumultuous, but none the less very enlightening inquiry going on in Manitoba for some time now which has, I am sure, told a lot of people things they knew full well in their hearts and even in their own experience, but perhaps when they expressed it they did not have credibility to the community at large. Notwithstanding the efforts to shut it down, and there were some very strong efforts to shut that inquiry down in Manitoba, that inquiry resulted in some incredible revelations, and I think some very effective revelations.

Would a similar inquiry with similar goals serve any useful purpose here in Ontario?

Chief Peters: First of all, I guess in Ontario we are not exempt from the kind of horror stories that you have heard under the Marshall inquiry or under the Harper or Osborne inquiries that were carried out in Manitoba.

As a matter of fact a couple of years ago, even before the inquiry in Manitoba was instituted, we in Ontario went through the same process in dealing with a case called the Shingebis case in northern Ontario. We brought that before the Ontario government, suggesting that this kind of behaviour dealing with the OPP in our communities should be looked at, that we should be looking at an inquiry in Ontario to see exactly the extent of the kind of racism that was described in

the Shingebis case, at the kind of behaviour and attitudes that were displayed in that case to see how rampant that was among the existing institutions within Ontario.

I think you get a lot of people in Ontario who get satisfied and a lot of people who say: "Yes, tonight I can go home and I can go to bed. I am happy. I am satisfied that something is being done with the native people across Ontario." We now have race relations in the policing business that says that a certain amount of ethnic people should be put into the policing system. I think we now have the government of Ontario saying to us: "Yes, we are prepared to negotiate a land claim settlement with Indian people. We are prepared to negotiate self-government," all of those things that signal to people that there are great things happening, but the reality is that there are no great things happening.

If we are committed as a people to living together in Ontario and if the Ontario government is committed to self-government in dealing with us and our land claims and our treaties, there should be no battle and there should be no fighting over the institutions we want to create right now, over the delivery of programs and the delivery of administration that is out there right now. Those things should not be up for major negotiations and battles. Those things should be gimmies; they should just be happening if we are all committed to the same thing.

The big problem we should be fighting is whether or not there is going to be any jurisdictional component to how we deal with ourselves and our communities now. That should be the battle. The kind of business we are fighting now is an action that just simply continues to tell us as a people that we have no capacity to make decisions, that at best somebody else makes standards for us and implements them for us. We are lucky if we have any say about what happens in the strictly financial portion of it.

Mr Kormos: Those are some incredible comments so far, and I am sure that a lot more time could be spent focusing on the particular areas.

In closing, I expect you will probably have to come up here once again with your neighbours in Hagersville when it comes down to—I hope with not the same amount of futility in negotiating some compensation for the ineffective handling of the tire fire down there. I hope that is dealt with more promptly than a lot of other issues have been dealt with, but thanks for coming. I appreciate it.

Chief Peters: Thank you. Once we have finished with the schools and then we start on the water and then we start on the tires—I think it will be a while before we get here on that component.

Mr Jackson: I appreciated that last comment about once we get started on the schools. As you know, I have had the pleasure of hearing four of your briefs in the last few years with respect to the select committee on education and various other components.

My first question has to do with this notion that ADR seems to somehow comfortably fit with land claims. I have an open mind, but I do not see that as the area we should be dealing with. Let me ask you as the first question, since the Attorney General of this province is also responsible for native rights in this province, to what extent has he consulted with you or your chief leaders with respect to the issue of ADR generally and its application to native people?

Chief Peters: As far as I know, and I am not 100 per cent aware of what happens with any of the four major political organizations that exist within Ontario, I am not aware of any formal dialogue that we have had with ADR at all on anything.

Mr Jackson: So the Attorney General, who is also responsible for the native affairs portfolio, in no way contacted you with respect to suggesting that there may be an opportunity for you to put your mind around the general field of alternative dispute resolution and justice, and its application to a whole series of cultural and political questions. This came really through this committee in terms of the invitation or engaging you in discussion.

1440

Chief Peters: Yes. I think it was necessary for us, when we got a response from the committee, to understand that. We had been looking for some time at different ways of staying out of court. When any committee gets established that can deal with something that has some potential to create a new mechanism to be able to deal with that, then certainly we would take that opportunity, and when it came from your committee, yes.

The only time we have discussed any kind of ADR is in terms of the land claims, and again, that has only been recently, within perhaps the last couple of months where there was a proposal from the Indian side to say perhaps binding arbitration or arbitration should be one of the things we should look at as one of the ways of trying to resolve some of these claims, because

we have hundreds and hundreds of land claims in Ontario.

Mr Jackson: Yes. Chief Peters, I guess I have concerns as to who is taking the lead on this issue of alternative dispute resolution as it relates to native people generally in Ontario. I have some very strong personal views and I am diametrically opposed to the Attorney General. Meech Lake, for example; I voted against it and I cited, as I know Richard Johnston would do likewise if he were here, our objection because of its implications for native people and their rights.

I also support, as Mr Epp does, the notion of entrenching property rights because property rights are as valid in our Constitution for the founding peoples of this country as they are for those of us who followed. It seems to me that those two mechanisms of justice are not working to the benefit of Canadians of native ancestry.

I am a little sceptical of now looking at alternative dispute resolution models as sort of—the courts are not working, which is what you have admitted. The final solutions are not cracking up to be what they should be, and I say no wonder, when land property rights have been extracted from our charter and our Constitution, and the Meech Lake accord fails to recognize in clear distinctive terms native peoples' rights.

Also, I am nervous that potentially ADR can be a method which is done indoors, whereas court is done in the full light of day and the court has time frames, which ADR does not necessarily have. We can agree to disagree and come back to the round table again.

I would like you to respond to those comments, but then I want to talk to you about other areas for native people in terms of ADR. I will deal in specific areas, such as schools, your police forces, your tribal councils and some of the work your council does and the parallel between that. But before I leave, I want you to give some further reaction. Are we reacting to ADR out of futility or are we looking to it with some degree of hope, because I see a clear distinction from where I sit in terms of how native land claims have been handled by all governments in Canada?

Chief Peters: I guess from our point of view the ADR is a procedural way of moving ahead. Right now, the procedural areas in terms of the land claims are not the questions that are in dispute, so for us in the land claims procedure there is not, I guess, a lot of hope that we could institute the ADR and that it would become suddenly the new solution to dealing with land.

The major question of land is ownership. When we talk about land ownership and occupancy, we are into a whole different ball game that certainly the politicians have not been able to resolve and to this extent the courts have not even been able to resolve. When we talk about aboriginal title and the Nishga case back some years, there was a split decision in the Supreme Court so nobody really knows the extent of the question to be answered in terms of the ownership of land. That is something we see as being a little outside the realm of ADR.

I guess in terms of how we proceed, the question that comes to mind now is the tradeoffs versus the benefits. I do not know what kind of tradeoffs I am expected to deal with in terms of the ADR, if it is to institute something on one side and what the benefit will be on the other side. That is an open question that I said in my earlier remarks we would have to be very careful of in the analysis we will have to do in terms of being able to look at that in that kind of context, to ensure that we have some continuing protection there for ourselves.

I guess those are a couple of comments on that. The last one, or one of the ones you asked about, and I guess these are ones we also look at, the private, no time frames of ADR versus the public and the time frames of the courts: I guess for us they are equally as evil in perception, because privately we have tried to take the press and we have tried to take everything out of negotiations so that we are virtually doing kitchen-type backroom negotiations now in all the areas we deal with with aboriginal people in Ontario. That has not worked, and we have gone to the open public forum and the courts, and that has not worked.

Mr Jackson: Not yet.

Chief Peters: Not yet, but it is going to work.

Mr Jackson: That is the point we are getting at.

Chief Peters: We are going to continue to move in those areas until the entire movement is understandable. It that is where we are at. I guess it has been a hit and miss as to what we have been able to utilize to this point in time and what the parties think they have been able to achieve out of trying to use either one.

Mr Jackson: Chief Peters, I am glad you clarified this notion about land claims and ADR. It is an incredibly complex area. To suggest that it has an application as a general statement—we might not resist the temptation to pick that up and deal with that as a clear recommendation. I think

we have to be very careful that we understand the nature of aboriginal land claims in Ontario and Canada and the relationship to our courts versus something that you are prepared to negotiate. It is elements within the court structure, and without abdicating your rights, that you are prepared to look at elements of negotiations. I do not think that point has come out clearly, but you have now helped us understand it.

Can I move to this notion. From my understanding of council administration on reserve, are there not some opportunities for ADR and ADR training which are rather consistent with the underpinnings of your cultural approach to matters of conflict within a tribe? The reason I raise that question is it strikes me that—we had a presentation earlier that says the talked about conflict is really not part of our nature, but it is part of our culture. It strikes me that with native people it is not part of their nature or their culture, and I saw a distinction there. With that in mind, are there elements where ADR would be helpful or ADR training would be helpful within various bands across Ontario?

Chief Peters: I think when you talk about it in the context of the kind of philosophy we have as a people, ADR becomes applicable—

Mr Jackson: That is what I thought.

Chief Peters: —as to how to resolve disputes, because traditionally within our past that has probably been one of the major ways our communities have resolved their differences, by being able to talk the issue through with the elders, to be able to talk the issues through with the leaders of the clans or the families or whoever has that responsibility within that given community.

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The one difference that we find, though, today is that when we start talking about those traditional ways of resolving disputes, in the report that we gave we said “the absence of first nations’ law.” When it is gone, we do not have that traditional value left within us. One of our chiefs described it as an egg with everything sucked out. It is very, very fragile that we continue to exist with some of those traditions and those beliefs still intact when all the other essences are sucked out of it because, in the end product, what you get in the absence of that first nations’ law, which is not currently recognized in Canada or in Ontario, you have to conform to either federal or provincial law and how that remedy is developed. So even if ADR is applied in the context of how we as a people with a

philosophy would like to have seen it, today it cannot be done 100 per cent in that way because of the existing circumstances that we live with.

Mr Jackson: You would agree, and this is what was troubling me over the weekend when I saw that you were coming and I kept thinking about this notion, that you have the one set of laws, which you have referenced, yet within your culture you have a much higher level set of laws that deal with conflict resolution, avoiding conflict and resolving it as opposed to an adversarial system, which ours has sort of evolved into under a common law system.

It strikes me that somehow we should be dealing with that as a principle, and this is why I am quite concerned that, since we have the Attorney General and the minister responsible for native affairs, one and the same in this province, we have not undertaken a meaningful discussion along these lines.

The application I want you to focus on, if the chair will permit me some further questions, has to do with education, which is an area where we know we are having a considerable amount of conflict both on reserve and off reserve in terms of relationships with schools boards and their codes—you understand what I mean by that—and those cultural norms that apply to native children.

It strikes me that there is a whole series of conflicts that are not being resolved properly. Somehow we should have the capacity to make some recommendations, even if you were to come back to us within the next week with one or two clear recommendations citing some examples where I know if you reflected on them, you might find some incidents.

Chief Peters: I guess the fact remains that, as you put it, there has not been, especially in the education portion of our dealings with the school boards across the country, to any great extent any satisfaction with the solutions that have been found, because the majority of the solutions that are found within the school boards are based on the majority vote situation.

As you know, we are only allowed to have a maximum of two people on any given board regardless of how many students we have in a given school. As part of the democratic system we always come out at the undemocratic end of the vote because of our lack of being able to have equal or greater representation in the case where our greater numbers warrant that kind of representation.

Mr Jackson: You are the only group left that is not. In other words, we have done it for the

Catholics and the francophones but we have not done it for native people in this province. You are the last group that has not been—

Chief Peters: It still exists. There are only two members regardless of how many people you have in any given institution.

Mr Jackson: My point was that we have resolved that very question in all the other partners in education with the exception of native peoples in this province. It was the Liberals who brought in that legislation, so they have been resolving it, but they have not resolved this one. I did not mean to throw you off.

Chief Peters: No, that is fine. I was thinking about the part where you were talking about making recommendations further down the road. It is certainly something we would like to think over in terms of ADR and seeing how that could be applicable in trying to resolve those kinds of disputes. I will get back to you on that one.

Mr Jackson: I appreciate that. I have no more questions, but I appreciate your patience, Mr Chairman. Thank you very much, Chief Peters.

The Chair: I do not see any other questions from any of the committee members. I have one wrapup question myself. I conclude from your comments, Chief Peters, that from your point of view and that of the Chiefs of Ontario, it is preferable to negotiate than to litigate. That brings me to the question, what form or what process should that negotiation take? In terms of this committee, we are looking to recommend to the Attorney General and the Legislature certain government of Ontario policies.

My question to you is, would it be an appropriate recommendation for this committee, in your opinion, to ask the Attorney General to negotiate with the Chiefs of Ontario, for example, to try to establish appropriate forms of ADR which are acceptable to both sides and which take into account the first nations' laws? You indicate that there is a hollow eggshell there in terms of the remaining first nations' laws.

Do you think it would be a positive prospect to sit down with the province of Ontario and try to incorporate some first nations' laws or principles with the government of Ontario to try to come up with some forms of ADR acceptable to the Chiefs of Ontario and to the Indian peoples?

Chief Peters: You may or may not know that last year was the first time we were able to get a resolution from our chiefs in assembly that gave us the mandate to go ahead and begin to start dealing with the provincial government in a major fashion. It has been hit and miss over the

years because some people thought that our relationship was directly with the crown in right of Canada and that the bilateral relationship between our nations and the federal government was to be held on top.

What we are now saying is that we began and we want to start to iron out the difficulties and barriers that we had between ourselves and the provincial government of why we could not come to the table to be able to talk and find solutions to the problems that we had. We have had a variety of meetings over the last I guess almost 10 months now and we have virtually come back to a standstill, because one of the major elements that is missing in our discussions is that we are both starting from a different premise.

The Ontario government is starting from the premise that we have no rights as Indian people, that if we have any rights they are treaty rights, and those treaty rights have to be very, very explicitly written into the treaty before there are any kinds of discussions or negotiations surrounding those rights.

We have taken the premise that we have rights. They are inherent rights. Obviously we have treaty rights because we have signed treaties. We would like to figure out what role the provincial government has to play in the implementation of those vis-à-vis section 35 of the Constitution and what powers the provincial government has under section 92.

That premise has kept us apart to some extent, but the discussions are still going on and we are still looking for mechanisms to deal with. I think one of the things that could be recommended is yes, first of all, before we start looking for the ADRs wherever they may be, there has to be some general statement made politically that there is good faith in the negotiations we will have; that there is a recognition that as a people we have a value within the province of Ontario; that we have our communities and we have our lands and those are not subject to the whims of anyone during the course of any kinds of discussions that may occur.

First, that premise should be established—we know that it will not be established legally—but politically established that that recognition of us as a people is there and we can begin to talk about what appropriate forums are necessary for us to be able to make these kinds of changes. I think in order to make those changes we have to very, very clearly identify the barriers that separate us. We have not acknowledged those barriers that separate us here.

The only reason that we are starting to acknowledge the fact that there are some distinct barriers between us is because those barriers are being brought very clearly to the provincial government by the mining companies, by the logging companies, those people who are interested in dealing with the natural resources in this province. If we can deal with that premise, we are open to negotiations.

We have always said we were open to negotiations and we detest the fact that we have to deal with litigation in the province and also in any other courts beyond the province. We are prepared to sit down and begin discussions, with the understanding of that premise that will take us into a body that would be able to provide for us a reasonable way to coexist in this province of Ontario.

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The Chair: I do not see any other questions from any of the committee members so, Chief Peters, I want to thank you and your associates very much for coming before the committee today. We appreciate it very much. I am sure your comments will be taken into account in our final report to the Legislature.

Mr D. W. Smith: I just heard a comment there from Chief Peters and I wondered if I heard him right. You said the province does not believe you have any rights or something to that effect, when you are starting to negotiate. What do they really believe then, in your opinion, if you think they do not think you have any rights?

Chief Peters: I have been to a lot of court cases that have dealt with aboriginal and treaty rights in the province of Ontario. I only have to go back to 1984, to Justice Steele and his remarks about the Temagami people and Indian people in general that said very clearly that we did not have any rights. If we had any rights, it was the right to wander around on the land to pick a few berries, eat a few fish, take some clay and make a little bit of pottery and maybe use some birch bark and make a canoe or something. That was the extent of the rights that we had.

The perception that we deal with when we begin any kind of talks with the provincial government is that those are not political discussions that we are embarking upon. That is why I am asking the chairman now to say that we need to begin political discussions. If we are going to continue the line that we have now, we are dealing simply with the legalistic approach to rights in the province of Ontario. The courts in Ontario say there are no rights when we know very clearly that there are. We need to get past the

legalese and we need to get down to some serious discussions on the fact that we are human beings, and that we are alive and that we have relationships here.

Mr D. W. Smith: Do you think the attitudes will be changing a little bit just because of what has come out of the Donald Marshall case in Nova Scotia? Do you think there is an attitudinal change taking place or do you feel that you have not gained anything?

Chief Peters: I am not particularly positive that there will be a change in the province of Ontario because I believe that in Ontario, within the institutions that we deal with and the length of time that we have dealt with those institutions, the subtlety is very much the problem that we face. It is hard to deal with it. If it was very blatant we could deal with it very clearly, but it is so subtle that to say the word "racism" or to say the word "discrimination," you know, then people become up in arms over the fact that, "This is what the Ontario government has done for you"—and all these things that we deal with.

Donald Marshall just opened the eyes of a few people in the east. I think the shooting of J. J. Harper in Winnipeg opened a few eyes in the west. Now the investigation into what has been described as the systematic killing of Bloods in Alberta, which is going on right now as an inquiry, is another facet that is opening a few eyes. I think we need to go beyond the kind of discussions we have here as a committee to look at the kind of ingrained depth of the problem that we face in Ontario.

Mr Jackson: Chief Peters, you have been before us to illustrate another point which has to do with this province's preoccupation with heritage languages, for example, and the amount of political support that it has given. Yet I think one of your presentations indicated that there are three native languages which are at risk of becoming extinct off the face of the earth, and that begs the question as to just where our priorities are.

That is a very subtle example of the kinds of things that are legitimate concerns of native people with respect to teachers, their training, language protection and support as basic and fundamental as that. Yet there just does not seem to be the political will to follow through with it, which is, I think, what was referenced earlier. We are seeing some glimmer of that out of Manitoba in educational terms, but certainly we are not getting that here in Ontario. You might want to briefly comment on that, but it strikes me that it is just one more example of something that

we are about to lose and nobody seems to want to talk about it.

Chief Peters: You are talking about it, and I guess that is the start of how we deal with issues, that people have to become aware that those are issues that we are dealing with within our communities. The language problem that we have is tremendous in terms of the loss of language, but I think what has happened over the past few years is that the onus that is upon us as people has become stronger and stronger.

We have accepted the responsibility that we can deal with our languages and we can deal with our traditions and our customs. We do not need legislation any longer, we do not need policy any longer to be able to deal with those things, and we are going ahead with them. When we come into conflict with school boards, then we will fight those issues with school boards.

I guess basically what we are saying is that there is a new development or there is a new growth or there is a new component that has been added to the whole issue of the Indian self-government movement. It also calls for responsibility in ourselves and not to treat ourselves like the victims and rely on somebody else to solve problems for us.

You help make us aware of the problems and you help us deal with some of the problems in any capacity that we can deal with and we will eventually solve a lot of those problems and, hopefully, this kind of process will become acceptable to people.

The Chair: Once again, thank you very much, Chief Peters, for your submission.

ONTARIO NATIVE AFFAIRS DIRECTORATE

The Chair: Next we have two witnesses from the Ontario native affairs directorate. I would ask them both to come forward, please. The first, Mark Krasnick, is a lawyer and executive director of the Ontario native affairs directorate and Mark Stevenson is counsel to the Ontario native affairs directorate and has been legal adviser to the federal government in the office of aboriginal and constitutional affairs. We are in your hands and presumably you will leave some time afterwards for questions and answers.

Mr Krasnick: I am Mark Krasnick. Mark Stevenson, on my right, will be discussing alternative justice systems. I will be trying to put in focus some of the questions around land claims and aboriginal rights issues and alternative dispute resolution matters.

Mr Jackson: I need a clarification. I am having difficulty putting in context exactly the nature of the directorate. I think I understand. Could we get a brief explanation. Are you a provincial ministry as an advisory directorate to the government? I am trying to put you in context. Forgive me.

The Chair: In fact, what is the directorate?

Mr Krasnick: The directorate is one of, I think, four provincial directorates like the women's directorate and the Office for Disabled Persons. It is an advocacy organization in part and it also has a responsibility for negotiations. It negotiates land claims on behalf of the government and it negotiates self-government on behalf of the government. It also attempts to perform what we call the facilitation and resolution of issues within government, trying to move along the aboriginal agenda. So it is part of the Ontario government.

Mr Jackson: You are a civil servant?

Mr Krasnick: I am a civil servant, yes.

Mr Jackson: Your directorate reports to the minister responsible, the Attorney General, Mr Scott?

Mr Krasnick: Yes.

Mr Jackson: You would act in some capacity as a mediator, a negotiator between the native peoples and the government? Have you been in that position? I am trying to get the context.

Mr Krasnick: We perform that function in part, yes. Within the system, we advocate for resources, we advocate for resolution of issues, we advocate mainly for positions which the aboriginal people may be putting forward.

Mr Jackson: That is helpful. Thank you very much, I did not mean to interrupt.

1510

Mr Krasnick: I would like to begin by thanking the committee for requesting that we appear. It is very much an honour. We are by no means experts on alternative dispute resolution, but I expect that you will be by the end of this process. We are gaining some considerable experience which I would like to share with you today.

I will be drawing from a speech I gave to a conference on litigating land claims last year. My last year's experience, however, hopefully will add some new and additional perspectives.

By way of introduction, very shortly, the native affairs directorate sees its mission as facilitating the resolution of issues. In that sense

we can be viewed as an institutional response to the quest for alternative approaches.

The directorate is involved in a number of types of negotiation. With aboriginal groups we negotiate land claim settlements and self-government agreements. We try and settle existing litigation. As we fund certain groups, we negotiate levels of support as well. We also play a role in the negotiation of resource development agreements.

We also participate, and I think this is not as well known, in federal-provincial negotiations. There is a constant demand between governments to clarify who does what, to attempt to assign responsibility, to allocate costs and determine who should take the lead in various issues. Then we participate in formal and informal dispute resolution in what we call the tripartite context, tripartite meaning federal, provincial as well as with an aboriginal community or communities. Here we have established the Indian Commission of Ontario as one mechanism to organize these activities. You will, I see, be hearing from its commissioner, Harry LaForme, tomorrow.

Litigation and the threat of litigation is now a constant part of the endeavour. This derives from new interpretations of treaties, the inclusion of a clause on aboriginal and treaty rights in the Constitution of Canada and more resources being made available for a more careful and complete analysis of aboriginal grievances. It also derives from an impatience with the rate of response by government from what is perceived as a limited amount of practical change that other approaches have been able to achieve, and I think by a sense that in this generation, courts are, on balance, sympathetic to native rights claims.

We can attempt to categorize claims. Most of our 50 claims relate to a mistake or error by government. These can occur throughout the treaty-making or treaty implementation process, and these claims go back for up to 250 years.

The first or comprehensive type of claim is premised on a belief that a community was missed at the time of treaty. A single first nation or band, a number of first nations or an entire aboriginal nation claims that it was not consulted when the treaty was signed. These claims are the claims that lead to the assertion that aboriginal title has not been extinguished.

The second type of claims revolve around implementation. This has two aspects to it, a specific aspect and a general aspect. Here again, there are a number of assertions put forward by aboriginal people. The most specific type of

claim is that the language of the treaty has not been lived up to. For example, a reserve was provided for in the treaty, but it did not correspond with the size of the reserve set out in the treaty itself.

But there is another implementation claim which does not relate to land but relates to the exercise of treaty rights. These claims may be general in nature: "We agreed as aboriginal people to a treaty of peace and friendship, but never agreed to give up our rights to continue to enjoy the use of our land," or to be more specific, "During oral discussions between the treaty commissioners and our people, the crown agreed to recognize our exclusive right to wild rice harvesting throughout our lands, a fact which has been consistently ignored by government policy."

The third type of claim that we see emerge with the passage of time—and these claims are in some ways the most difficult—these claims emerge as conditions change, as a sturgeon fishery is decimated at the turn of the 20th century or as development begins to encroach as mining, logging or settlement makes the exercise of the traditional way of life and earning a livelihood more and more difficult.

Solving these claims is important to the government because the relationship between most Indian people and some Metis people was and is still governed by the treaties entered into by the crown and the first nations of Ontario. We want to reinforce that we continue to respect the treaties and continue to be prepared to discuss ways to make them both contemporary and appropriate. The province has authorized settlement negotiations on about a dozen claims, and the first are now being settled.

I want to talk for a moment about the federal approach as well. I will not go into the detail in my paper, but claims resolution to Ottawa is seen as a substitute for court action. It is a policy and a program of Canada which is administered by the Department of Indian Affairs and Northern Development. Filing both what are termed "comprehensive" and "specific" claims are administrative procedures, and I spell out the type of documentation that is required in my paper.

For purposes of brevity I think I will leave that out, but to say that when a claim has been submitted to Ottawa the Minister of Indian Affairs and Northern Development reviews a submission and seeks the advice of the Minister of Justice as to its acceptability according to legal criteria. In very many ways it is like an administrative tribunal. Looking at the informa-

tion that has been provided in the objectives of the policy, the types of questions that the federal Minister of Justice has to answer are, has aboriginal title been extinguished or superceded by law, has a treaty been signed and did the claimants adhere to a treaty in the past generations?

According to federal policy, there are no comprehensive claims in Ontario. In other words, no application by a first nation in Ontario has met the test spelled out in the comprehensive claims policy enunciated above. That may be true, but let me read from a few documents currently before our courts.

From a judgement: "The appellants claim that the title...is burdened by aboriginal rights."

From a writ of summons: "The plaintiff's claim is for...a declaration that they have not surrendered...and continue to have...title to certain lands and waters in and around the territory on the north shore of Lake Superior."

From a notice of intended action: "The declaration sought will be that aboriginal title...to those lands have never been surrendered to the crown and that no...act has extinguished the title and rights."

There is a parallel administrative procedure to deal with specific claims in Ottawa, and the federal government has now created a treaty commissioner in Saskatchewan who is not only to look at rights to land but is also to look at the other promises made at the time of treaty.

Let me just turn to a brief description given in a Canadian Bar Association report which I hope casts a bit of light on the interaction in this issue.

"The total process is one that starts with a perception of rights, a realization that rights have been thwarted or deprived, the formulation of a claim, the initiation of discussions, recognition of the claim to the point where negotiations begin, or threat of court action or other consequences to provoke a negotiating response.

"Adjudication and negotiation interplay in what is an iterative process towards settlement. Even if litigation produces a judicial decision, there is a likelihood in aboriginal claims cases that negotiations will follow, whichever side wins or loses."

I think the point to emphasize here is that we occasionally talk about litigation versus negotiation and, as I will point out soon, we have a preference for negotiating as opposed to litigating, but the truth of the matter may be that in many of these cases both will occur at the same time, and they are not alternatives but part of one and the same thing.

I go on to talk a bit about the two examples, one of which is the Temagami claim, which I am sure you know something about, and the second is the tripartite agreement with the Walpole Island first nation in southwestern Ontario. In both cases, it is asserted that no treaty covers the area in which the first nation has participated. Both address the issue of whether there is still aboriginal title. One of the cases is, however, highly visible and it has been the subject of protracted court battles. The other has had much less publicity, although the negotiations have been protracted as well.

In the Walpole Island case, what we are looking at is a way of resolving a boundary dispute. The disputed territory at Lake St Clair has never been surrendered or been the subject of treaty, and all of the parties agreed on the need to negotiate a satisfactory resolution.

On the next page I go on to say that we have essentially signed an agreement saying that we will make every reasonable effort to negotiate and conclude agreements that resolve the issues indicated above in a spirit of goodwill and good faith. That is a commitment of the federal, provincial and first nation to try to do that.

But when we turn to Temagami, we will see that the issue before the court was the same thing, that a treaty had never been signed. This legal process is now in its second decade. The Court of Appeal has ruled that the claimants were either parties to a treaty or were subsequently bound by adhesion to that treaty, and therefore aboriginal rights enjoyed by the Temagami Indians were extinguished by the treaty, but still the question of compensation has not been the subject of court determination and it will remain, no matter what the outcome at the Supreme Court of Canada.

Let me try to draw some conclusions from these very brief remarks about what I think we can say which may be helpful in your deliberations. First, we believe it is preferable to negotiate rather than litigate but, second, if the claimant prefers litigation, prepare for community tension and alienation, especially if economic development is put at risk during that process. Third, litigation is expensive and becomes a priority over other negotiations. Fourth, both processes will take a long time. Fifth, the need for precedents, accomplishments and people who can make it happen should not be underestimated.

What does it take to get these disputes settled? First, realism. That is extremely hard because the rules are so elusive in this area of the law that all parties can articulate a good case and therefore

are loath to compromise. Next, understanding the various instruments, the threat of litigation, public opinion, lobbying and appearances before administrative tribunals is an important part of the exercise. Third, making the right choice between litigation and negotiation may be the hardest choice of all.

Participation in negotiation by governments is based on a concept of looking at the future. That means that governments are usually not prepared to agree to damages for past actions. Financial arrangements can, however, be made to provide to meet the future needs of the community.

I wanted to say a few words about why the system is so inefficient, why it takes so long and why it appears that positions are intransigent, because I think if you are to look at this as one area of consideration, it is something that has to be hit head on.

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First, in most of these claims, and it does not matter what level of government you are dealing with, more than one department is involved and a legal opinion must be agreed to before any action can proceed. Second, governments fear precedent. Third, because of the uncertainty as to outcome, no one has been able to predict in advance where a case or a negotiation will take you. Fourth, the process of land claims negotiation does not appear to be a win-win situation. Different departments own different parts of the issue. For example, if you have a dispute which involves, say, a federal fishery and a federal park and provincial cultural artefacts, you find that there are a large number of interdepartmental and intergovernmental interests that have to be involved. Sixth, litigation has a habit of freezing bureaucracy. People wait for the court case to be concluded. Seventh, governments have not agreed as to how many claims they can afford to settle in a year. Eighth, neither politicians, officials nor the press are comfortable with this as an issue.

So does this mean that going to court is the only solution? I would say that courts have their drawbacks too. Probably the most important and serious drawback is the need to rescue a relationship when the trial is over. While litigation plays an important role in our society as part of a continuous relationship that must endure over centuries, its utility can be overstated. Governments must coexist, and by this I mean first nations and provincial government, and claims litigation is costly and divisive.

We know why courts have a habit of picking winners and losers. In this area they try to avoid

that, but it still is necessary. The stakes are high, and after litigation there is still a costly need to put together the relationship once again.

So why use the courts? There are reasons. Governments are not likely to admit mistakes, especially where law and facts are uncertain. Governments get a certain comfort from having an impartial adjudicator having made a decision. Courts must realize however that their jobs may require a certain capacity to manage the process. Deciding that aboriginal title exists is only the beginning. Using the courts suffers from being situational and localized. It pits citizen against citizen, logger versus trapper for example, and society has worked hard to make these nonjusticiable issues.

Let met talk a bit about the solutions. Where do we go from here? To begin with, let me amplify a bit on resource development agreements. You will have heard, in looking at environmental disputes, about the use of mediation to circumvent the slow and costly adjudicative process. There are a number of examples now where mining companies have been prepared to negotiate agreements with governments and first nations which spell out the environmental rules and the social and economic benefits that can accrue to aboriginal communities if a mine is to go in.

These began as slow negotiations taking years, but now a pattern has developed where proponents, governments and first nations can work together, usually with the support of an active mediator. The literature for alternative dispute resolution points out the utility of mediators and the roles they can perform, and it is true in this area.

But to go farther, is it now time for umbrella legislation or a new forum? We now have experience both north of 60 and in Quebec with provincial and territorial governments, with Cree Indians, Inuit and Metis. We may have enough for framework federal legislation and parallel and corresponding provincial legislation. In that way, negotiators can be given mandates and mediators can be given an appropriate amount of authority. The point would be to reduce the number of issues that negotiators have to address each time and provide a framework for negotiations.

It may also be time to consider an intermediate tribunal. It is true that previous attempts at something like a claims commission or court have failed. But the Canadian Bar Association has again proposed one for specific claims and I can see its utility in many of the cases that we

have addressed. Even if it were nonbinding, it would speed up the process and at least have the issues squarely confront decision-makers.

What role can the judiciary play? "It is recommended," the bar said, "that serious study be given to making judicial remedies more effective in ensuring that both government policies and judicial remedies are fully implemented in relation to aboriginal rights or claims. This would require making injunctive relief available against the crown, enabling remedies in rem to be given against the crown, empowering the courts to require that governments enter into good-faith negotiations and employing positive injunctive relief, the so-called structural injunction, in appropriate cases."

In these cases, we would be copying what is the present American procedure. In the United States, the courts agree that there is an aboriginal right and then leave it to mediation to spell out the limits of that right. If the parties cannot agree, the courts are prepared to impose a settlement. It is our hope that we need not get to that stage, that less intrusive and more accountable methods can be arrived at, but it is still an approach we may end up seeing in the future.

Thank you very much, Mr Chairman.

The Chair: I suggest that perhaps Mr Stevenson make his submission and then we can combine the joint questions of both of you.

Mr Stevenson: I have prepared a background paper. I am not going to read from that. You might wish to read it at a later date. Just as a point of interest, I thought I should also mention that as well as being legal counsel to the Ontario Native Affairs Directorate, I am an executive member of the Indigenous Bar Association, which is the national association of Indian lawyers. I am also the interim chairman of the Aboriginal Legal Services Agency of Toronto. So I have a personal as well as a professional interest in this area.

What I thought I would do was briefly describe some of the justice-related mechanisms that are used in other jurisdictions in dealing with native justice issues and then talk a little bit about some possibilities within our system. I have outlined in my paper some of the theories of tribal sovereignty in the United States and how the court system fits within those theories.

In the United States, Indian governments exercise inherent sovereignty. What that means is that there are really three levels of government. There is the federal level, the state level and the Indian level. The Indians do not exercise delegated powers of government. This is something that is recognized within their constitution

and it is also carved out through the theory of tribal sovereignty that was articulated in some of the early Marshall judgements. So that is where they start from.

This theory of tribal sovereignty in the United States was first tested in the justice area in a decision called *ex parte Crow Dog*. What happened in that situation was that an Indian on reserve killed another Indian and the man was taken to trial and it went all the way up to the Supreme Court of the United States. The Supreme Court said: "Look, this man has already been tried under the customary law of the Indian community and it has been dealt with. It is double jeopardy. We have no jurisdiction," and he was let go. As you can imagine, that did not go over well in the eyes of the public.

The American government immediately began to carve away at the notion of tribal sovereignty, especially in the area of justice, by enacting the Major Crimes Act. The way it works today in the United States is there have been several pieces of federal legislation that have carved away at the concept of inherent sovereignty, in particular in the justice area. But they still have a tribal court system and the way that works is there is an act called the Indian Reorganization Act and it sets out three different types of courts that they use in the exercise of their jurisdiction over the justice area. They have a peacemaker court, they have a tribal court and there is also a court of appeal.

What the peacemaker court does is it deals with summary conviction offences. It uses arbitration. It is not an adversarial process. It has elders who come in and also speak to the judge. The tribal court is really like a European court system. If things cannot get worked out in the peacemaker court, it goes to the tribal court. The tribal court is used, it has the regular adversarial process, but there are Indian judges and it all comes under the Indian Reorganization Act. Then they have a court of appeal.

The largest tribal court system in the United States is on the Navajo Indian reserve. There are about 100,000 Indians living on that reserve and it has a jurisdiction of about 30,000 square miles. But the interesting thing to note in the tribal court system in the United States is that with respect to civil matters, the court has complete jurisdiction for civil matters which occur in Indian country, on the reserve. The only question that goes to an outside court is whether or not the court was acting within its jurisdiction. On the criminal side, the criminal matters are limited to quite an extent because of the use of the federal plenary powers. That is essentially an outline of the

system that they use in the United States, and it seems to be working. It has its flaws, like any other system, but I think by and large it does work.

1530

I will talk very briefly about what happens in New Zealand. The relationship between the Maori people in New Zealand and the non-Maori people is all outlined in a treaty called the Treaty of Waitangi. That treaty has two official versions. One is in English and one is in the Maori language. That treaty outlines the relationships. They have a tribunal called the Waitangi Tribunal and the purpose of that tribunal is to arbitrate differences with respect to the interpretation and meaning of that treaty. Since the treaty is written in two different languages, there are two fundamentally opposing views. The Maori take the view that the treaty allows them to deal with all issues of governance, and of course the non-Maori take the view that the treaty ceded governance issues.

There is a tribunal that is set up and it deals with every issue of dispute in relationship to that treaty, but the tribunal only has nonbinding authority. So at the end of the day they make a recommendation and the government can either agree to go with the recommendation or it can simply refuse. But it has a fair degree of public credibility and the press seems to side with the tribunal in any dispute, so the government gets a lot of bad press, and I guess in several cases it has backed off when it did not agree to go with the decision of the tribunal.

Of course in Canada the situation is much different. You are familiar with the jurisdictional wranglings between the federal and provincial governments, and when you get to Indian reserves it is that much more difficult. Indians can enact bylaws in relation to the observance of law and order. They can also enact bylaws in relation to nuisance and disorderly conduct. So they have a limited degree of bylaw-making powers. It is felt that if there was, I guess, a creative use of those bylaw-making powers, you might be able to have a system in place that governed a fair amount of criminal and a lot of the civil matters.

To this point, as I understand it, the problem has been that the federal government has a disallowance power with respect to Indian band bylaws. If they allow a band bylaw, then that bylaw takes precedence over other federal legislation, so they are very, very cautious with respect to allowing band bylaws. They have not really allowed bands to exercise a tremendous

amount of creativity when it comes to their bylaw-making powers.

With respect to the criminal side, there are types of alternative arrangements that can be considered in the north. I think that what is important is that the communities themselves exercise a large degree of control over the process in the north. One of the things that has been considered and has been suggested by Indian northern communities is that when it comes to sentencing, there be an elders' council that can speak to sentencing and have a role in the sentencing with the judge.

As you may know, most of the justice-related issues in the north involve alcohol-related offences, as well as offences related to family violence. In many instances a fine is given out, and because the individual may not have the money eventually he is incarcerated. It is felt that if there were arrangements made where an elders' council had a role in discussing sentencing, that could be a mechanism that might be effective.

A second method would be to use the type of system that is currently used under the Young Offenders Act. You have the section for the alternative measures mechanism. If a young offender chooses to use that mechanism, the charges are not brought forward. A youth court deals with the individual. They suggest alternative measures. If the measures are complied with, then the charges are dismissed. With regard to an Indian community, the suggestion has been that instead of being just for young offenders, it would be for the entire community, and for that to work you would have to have federal legislation that would adopt that type of mechanism.

A third alternative that has been suggested, which I have heard, is to simply stay proceedings through informal arrangements between the crown attorneys and the individual and the lawyers, and have an elders' council in an informal manner determine what the appropriate way to deal with the particular crime would be. If that does not work, because it is based on a consensus and the individual does not agree with the elders' council, then the charges could be reinstituted.

Those are some of the general comments I have and there is more detail in the background paper.

I have some closing comments. I thought what I would do is refer to a report by Professor Michael Jackson. The report is called *Locking Up Natives in Canada*. He deals in quite a

comprehensive way with the whole area of native people and the justice system. He deals with the issue of a parallel justice system, because that has been recommended by a number of Indian lawyers and a number of people from the Canadian Bar Association. In his conclusions Professor Jackson—I think it is worth while bearing those conclusions in mind—says:

“In the context of alternative native justice systems, we endorse the importance of legal pluralism within the Canadian Confederation and recommend that priority should be given by governments in their allocation of criminal justice research funds to encourage the development as pilot projects working models of contemporary native justice systems. We believe there is a sound constitutional basis for the development of parallel native justice systems. We have, however, refrained from endorsing any particular model because the particular model will be linked with an Indian nation’s or native community’s view of its path towards self-determination, and ultimately it is for them to choose. It is not unrealistic to anticipate that models of aboriginal justice systems can be worked out in a Canadian context which, cognizant of the experience of other jurisdictions, can reflect that accumulated wisdom of both aboriginal law ways and the common law.”

Those are my comments.

Mr D. W. Smith: I will not take too long. You both seem to have quite an understanding of this and I maybe have very little, but I am going to ask Mark, did you believe the statement Chief Peters made that the province believes the native people have no rights? I do not know whether you were here when he said that. I might ask this question of both of you really, but is that where you think the province is coming from? Oh, you are both Marks, so I will ask both Marks then.

Mr Krasnick: Chief Peters was referring to the litigation in the Temagami case, which I also alluded to in my statement. The Temagami case was argued over the question of whether, when a treaty is signed, any aboriginal rights continue to exist, and the position taken was that aboriginal rights have been extinguished at the time of the treaty signing. I think our own sense of it is that in Ontario there are still very real living aboriginal rights and treaty rights, and as I tried to say in my statement, the job is to try to make them relevant and contemporary.

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Mr D. W. Smith: Mark Stevenson, do you want some comment on that as well?

Mr Stevenson: I think that debate about whether there are or are not rights is really related to the question of self-government and sovereignty. I think Chief Peters takes the view that Indian bands, Indian tribes, exercise inherent sovereignty and that they exercise that pursuant to aboriginal or treaty rights. I think governments for the most part take the view that if there was an inherent sovereignty at one time, that inherent sovereignty is no longer being exercised.

Mr D. W. Smith: I think, Mark Stevenson, you said something about, I presume, the band or the elders of the band making a decision on an individual. Somebody did something to another person within the band. Was this a serious incident? Why would the people, I guess outside the reserve lands, be upset or why would they even be worried about it? Was this a criminal offence? I just want you to enlarge on it.

Mr Stevenson: I guess I should clarify that. I was talking about an issue that happened in the United States. I was talking about the American tribal court systems. What happened was the first test of tribal sovereignty in a situation where an Indian on an Indian reserve killed another Indian and the tribe dealt with it under their customary law. Then charges were laid under the general provisions of the American Criminal Code and it went all the way up to the Supreme Court of the United States. The Supreme Court said, “Well, the tribes exercise inherent sovereignty, therefore we have no jurisdiction to deal with this matter.”

With that decision, the public in the United States was outraged and as a result the American government passed the Major Crimes Act, which outlines those areas of criminal law that tribes cannot exercise jurisdiction over, murder being one of them.

Mr D. W. Smith: Just one final thing: Things are changing in Canada, I suppose. They are changing around the world. One of the witnesses last week was a woman who was speaking on this ADR issue and she felt things were changing because maybe there were more women lawyers and more women mediators and negotiators.

Things are starting to change in that area, and this is really maybe moving on even farther again, but do you think it is time that some of our first nations lawyers should be eligible to sit on the Supreme Courts and would give a better understanding? I know the world is changing very rapidly, and you might say that this is asking too much too quickly, I do not know, but I just

want to hear your comment on that, Mark Stevenson.

Mr Stevenson: Do not even talk about the Supreme Court, just any of the courts. Sure.

Mr D. W. Smith: I believe that Bertha Wilson was the first woman on the Supreme Court of Canada. Do you think the time has come when this can happen or it can even be talked about happening in the near future?

Mr Stevenson: I think it can happen. There are a number of very, very competent Indian lawyers out there. They are very competent and the day will come when an Indian lawyer will be sitting on the Supreme Court of Canada. It may be far off, but that day will come.

Mr Kormos: Just following up on your last comment and responding a little bit to Mr Smith, I am not sure how important it is other than for the symbolism inherent in it to have a native person, or even to have a woman, to have any particular type of person on the Supreme Court of Canada. It is in the trenches. It is the justices of the peace, the provincial judges; there are literally hundreds and hundreds of them who mete out justice, if you want to call it that, or some bastardized form of it based on their own perception of the reality of the world. Again, the Supreme Court is a special thing in itself.

I listened to Chief Peters. I hear what you are saying. I am concerned about this committee championing alternative dispute resolution as a great cure-all, whereas in fact, just as poor people, be they native people or other poor people, do not in my view have a fair shake in, among other places, our criminal justice system, there is nothing about alternative dispute resolution in the model we usually perceive to suggest that poor people, less educated people, less articulate people, less assertive people, people without the organizational resources—there is talk about a consideration being, should lawyers be excluded from an alternative dispute resolution or should there be a disincentive to utilize lawyers, when in fact the role of a lawyer can be very important in terms of defining the issues and uncovering and presenting useful evidence?

How much confidence can we have in alternative dispute resolution when we could really be creating dual systems that basically operate on the same plane and that basically require, if people are going to be successful in them, people with skill and resources. Once again, the application of the golden rule: he who has the gold makes the rules. How valuable can ADR be when we are talking about people who are disfranchised in any number of ways?

Mr Krasnick: I think you have hit on a number of issues; let me try to take them one at a time. We were talking about two things here, land claims, the right to settlement, and then going on to alternative justice systems mainly for criminal events. I think that in both those areas there seems to be a realization that alternative methods should be tried.

In terms of the civil system, in terms of access to justice for poor people or people without those types of access rights, I do not think we have commented on it. I do not know really what approach should be taken.

With respect to the on-reserve community, we are looking at ways of making the justice system there, responding to their request, more accessible. In the general community, it seems to me, it is an issue we really have not even started to tackle.

Mr Kormos: Precisely. I appreciate that there are a whole lot of people out there who know a whole lot more about the native communities in Ontario than I ever will. One of the things that in my view—if I am wrong say so now and I will never say this again—makes the native community special and the native person as a participant in—I guess my comments are focused in a criminal justice context. One of the things that makes the scenario an unfair one is that many, if not most native accused persons enter that system as poor people. Again, in that regard, they have a great deal in common with a lot of other people entering the criminal justice system. You want to talk about disproportionate numbers of native people, let's say, being incarcerated. There are disproportionate numbers of poor people being incarcerated, being sent to jail, for a number of obvious reasons and some not-so-obvious reasons.

Do you think poverty is a starting point in terms of common ground and a starting point in terms of addressing inequities in a justice system?

Mr Krasnick: It may be a starting point, but one of the examples Chief Peters talked about was the example of Mr Shingebis who is the subject now of a task force that we have that the Attorney General and the Solicitor General established. One of the issues we have learnt there is that because of language problems, because of access problems, aboriginal people are not getting the same treatment as other people in the community around north of Sioux Lookout, so it is both. I think it is hard to say it is just a poverty question.

Mr Kormos: For sure.

Mr Krasnick: I think it would be wrong to narrow it to that. I think there is definitely something that we find happening in the system that leads to a preponderant number of aboriginal people being incarcerated.

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Mr Kormos: I appreciate your saying that. We have had a number of judges, not just in Ontario but across the country, some from the territories, sometimes in their very unique and very special ways purporting to be responsive to native or aboriginal communities. I guess the parallel is the scenario you spoke of in the case in the United States, which I was not familiar with, where there is sometimes incredible backlash from the rest of the world, and maybe for good reasons in some of the instances and maybe for not-so-good reasons in other instances.

How do you propose to respond to that in view of the fact that never before has the judiciary been so at risk of the opprobrium that can be attached to it by, let's say, lobby groups or interest groups who are quick to condemn a particular action as not meeting particular goals, when in fact maybe the purpose of that conduct or that statement on the part of the judge was an effort, albeit not a perfect one, to be responsive to special circumstances?

Mr Krasnick: I do not know.

Mr Kormos: I am saying there are judges out there who appear to be trying to tailor justice. There is nothing in our society, in our criminal justice system that is offensive about tailoring justice. That is one of the qualities of our system. Yet when they attempt to do that, they become the victims of outspoken members of the community who in some instances would applaud it, in other instances would condemn it.

Judges are having a great deal of their tailoring power denied them by the existence of some very vocal and powerful lobby groups in our communities. To a large extent some judges are feeling pressures that they never have before. In some respects it is good, but in other respects, do you not see that as possibly deterring a judge from tailoring justice to meet the special needs of a native community?

Mr Krasnick: I think that maybe, taking the question narrowly, there is still—what Mark Stevenson tried to address in his remarks was a number of ways in which the system can be adapted. I think it is going to take judges, prosecutors and defence counsel who are prepared to meet these issues head-on. I think you

are right, that there will be and there has been a perception of unequal application of justice. What has to be made clear is that the Criminal Code has always allowed for a wide variety of sentencing options, and in many of the communities where there are high rates of conviction, high rates of incarceration, that is what will be required.

I do not think anyone feels that alternative systems are the only way of coming to grips with these questions, and therefore I think you are going to find that the existing system will also have to be adaptable. I guess that is all I could say. I do not really want to get into a debate over what sorts of interest groups and—

Mr Kormos: Perhaps I should ask you as well, both of you, are you capable of reconciling the roles of the AG currently, as being both the Attorney General and doing what the Attorney General should do, and at the same time being, among other things, the minister responsible for native affairs, in view of the fact that some of the litigation is obviously involved in natives and native rights?

Mr Krasnick: From our perspective, what we are finding in the litigation area is that the separation between the responsibilities is quite clear to us and quite clear to the Ministry of the Attorney General staff. It appears to be a relationship that works, so far.

The Chair: Last Tuesday, Professor Paul Emond from Osgoode Hall law school was a witness before the committee. I asked him a couple of questions and he gave a couple of interesting responses. I am just going to read from the Instant Hansard transcript parts of the questions and parts of the answers—I do not want to belabour you with the whole amount—so that you will know the gist of what I am driving at. I am going to ask you both to comment afterwards.

The first question was, “In what context would you put the whole area of ADR at this point in Ontario and in Canada?” Mr Emond responded: “I think it is easy for people like myself who are committed to the concept to overestimate the extent to which it is going to sweep across and change the face of the country. I think it is still very much at a preliminary stage. I think that what it needs now to catch on and to be successful is a handful, perhaps 10, important, difficult, contentious, otherwise very expensive cases to be resolved in this way. Once that happens, I think the momentum for ADR will begin to grow.”

There was some additional answer to that question, but I went on to ask him a subsequent

question: "If it needs a push or somebody to stir up the pot, and you are talking about the 10 or so significant cases that would be required, I guess if I can ask you a hypothetical situation, if you were the Attorney General of Ontario how would you do that?"

Mr Emond responded: "I think I would be inclined to look at a problem that faces the Attorney General right now, and that is the issue of native self-government, and specific and some comprehensive claims, and rather than ending up with the kinds of situations that we see in Temagami and elsewhere that have become disputes of a sort that could never be mediated because the positions of the parties have so hardened, I would instruct my staff to put in place the necessary people and the necessary structures to use ADR on a case-by-case basis to begin to resolve those kinds of issues...."

How would you both respond to that advice?

Mr Krasnick: I think that you will hear from Commissioner LaForme tomorrow the powers that are available within the Indian Commission of Ontario. The Indian Commission of Ontario has the power to do mediation, to refer items to arbitration. We have just completed a review and evaluation of the Indian Commission of Ontario. I think that over the next couple of years you are going to see that we do use it more, as Professor Emond said, to take some of these more contentious issues and try to see whether they would be amenable to a different form of dispute resolution. So my sense would be that it is not just a question of a reference by government; there is also a sense that the first nations or the aboriginal community also has to be willing to put it to that type of dispute resolution body.

I should say, however, that we have a few cases now in terms of land claim settlements where we have gone to what we call expert fact-finders. It has proven that they are able, as part of their job, to bring the parties closer together and get over a number of hurdles. One of our problems has been that we see that they are hurdles which both sides get caught up in and no one is prepared to compromise.

Although we call them fact-finders, those persons have been able, by giving both parties expert advice, to move the negotiations along. We have not done it on anything which is highly visible or that controversial, but we are starting to use that technique in trying to resolve issues where there just has been no give for a number of years. My sense would be that if we could find the right type of case, it would be worth trying as an exercise.

The Chair: Are you saying that you agree with Professor Emond?

Mr Krasnick: I am not sure about the 10, but I would say that if the right case came up, yes, I think it is worth trying and experimenting to see whether an ADR form would be a better one than what we currently do.

The Chair: I have another question and it flows from Mr Kormos's question, and is supplementary to Mr Kormos's, and that is the question of perhaps seeing a system of ADR develop that builds the same injustices into the system that we see in the court system now, about access, costs, expenses and so forth. Do you see intervener funding playing a significant role in ADR, particularly with respect to native-related issues?

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Mr Krasnick: I think that the preliminary question with respect to the intervener funding is really in the traditional court cases. We still have not dealt with that in a way, and there are a number of groups that do not have the access to funds to make their case. I do not think resources for the aboriginal groups themselves would be as major an issue as it is today in trying to bring a court challenge, so I do not see ADR as being an issue.

The Chair: But in terms of the type of suggestion, for example, in the correction system that was referred to by your colleague, is it possible that funding could be an issue in those circumstances?

Mr Krasnick: If I can give an example from the child welfare legislation where we have members of first nations who appear in court on behalf of their first nation with respect to custody cases, it seems to me that we do have intervener funding that we do provide, but we call it band councillor funding. So the precedent has been set. If there is a community interest in a new type of institution, I think we would look at intervener funding or funding for the community so we could make sure its case was put. I think it would be something that we would look at as part and parcel of the proposal.

The Chair: Today we are talking about ADR in the native issue context, and we obviously see ADR happening in various ways in other areas, such as family law and commercial disputes. Today we happen to be looking at it in the context of native affairs. Do you feel that the government of Ontario should look at a comprehensive policy to deal with ADR, or do you think it should

continue to look at it subject by subject or area by area, as and when it occurs?

Mr Krasnick: Without wanting to get into the policy, it seems to me that in our field we still have a number of years of experimentation to go before we know what works and what does not work. We are still just beginning the experimentation stage, so to propose a uniform legislation would be premature. My sense would be that we are going to need to try, in the way Professor Emond said, some of these experiments to see what comes out of it before we propose anything more general.

The Chair: Are there any agencies, boards or commissions that deal with native rights?

Mr Krasnick: Most of the processes, as I tried to allude to, are internal to the federal government. Essentially there is an administrative process to deal with claims, and the comprehensive claims branch as well. There is also the new treaty commissioner in Saskatchewan, who may end up having that power of being able to deal with adjudicating aboriginal rights claims in Saskatchewan. That is the only place that I know of. Then, of course, there is the Indian Commission of Ontario itself, which you hear from tomorrow and which is the only other experiment in Canada.

The Chair: Describe very briefly what the Indian commission is.

Mr Krasnick: The Indian commission is a body created by the federal government, the provincial government and the first nations of Ontario. It has the power to hold meetings of all of the parties and deal with an agenda of issues that confront the various parties. It deals with land claims, it deals with self-government negotiation and it deals with disputes and issues that emerge between the parties.

In its orders in council, and the orders in council are both federal and provincial, it has the power to recommend the appointment of a commissioner with commission of inquiry powers. It has the power to appoint arbitrators. It has the power to do its own mediation. So it has a very broad legislative mandate to intervene and try to move disputes towards settlement. That is what it does. In a sense, it has the capacity of being a very proactive dispute resolution mechanism.

Mr Kormos: You are talking to a certain extent about how flexible or how adaptable existing institutions can be in embracing new models. We are talking about an institutional approach to these things rather than individuals. This is not an appearance on the Judge Wapner

program. We are talking about institutions utilizing new models.

You talk about young offender courts, and my response would be that to the extent that the young offender approach has failed, it has been because almost everybody entering the young offender system has utilized traditional models, as crass as taking the Hamilton-Wentworth Detention Centre, which is as jailish a jail as one could ever get, and putting a new sign up calling it the "Young Offenders Wing" and the provincial government saying, "There. We've met our obligations under the Young Offenders Act," or the fact that the same criminal judges with the same approaches—and there is nothing wrong with them from a criminal context—are hearing young offender trials.

Basically the course of sentencing in the young offender system has been modelled on the traditional criminal sentencing approach. We saw the Court of Appeal permit general deterrence to exist in a far stronger way than traditional case law had with respect to youthful offenders. So it is bizarre. Young offenders in many respects have become more criminalized and the treatment of them is more criminal under the young offender system than youthful offenders were treated, in view of the case law in this province, in the old system.

How adaptable are people? How do we avoid taking into a new regime preconceived notions and the remnants, even if we dismantle the remnants, and the narrow mind of traditional models? You see, I am not convinced that most of what has happened so far, even in our consideration and this committee's consideration—and I concede that I have been watching it from afar for this first week—has been particularly novel or creative.

We are still sticking close to some pretty rigid and tight models and ones that we and the persons making submissions all feel comfortable with. There is adjusting and fine-tuning and little bursts of creativity, but nobody has really come in here—some have appeared to—and said: "Look, the whole way it has always been done is nothing. Wait until you see what I've got in mind." Nobody has done that. What is the barrier? What is the hurdle in that regard?

Mr Stevenson: I guess with respect to the justice area that I was talking about earlier, there are very fundamental constitutional barriers. There may in fact be serious charter problems if you start dealing with Indian people in a totally different way. No matter how novel or interesting it is, it may cause some serious charter

problems. For anything to really work, you may require substantial changes, and substantial changes in the law are a federal matter.

We are talking about changes to the Criminal Code, at least where there could be a sort of opting-out mechanism and where there would be an amendment so that if a new institution were in place, those sections of the Criminal Code would not kick in. For those types of things to work, you need fundamental changes to the law and that is very difficult. No matter how interesting they might be, they are very difficult to do. It is easy to walk in and say, "Gee whiz, we can do this," but there are major, major questions that have to be addressed before you can do them.

Mr Krasnick: Just to add to that, it is our hope that if and as we negotiate self-government agreements, there will be a capacity for aboriginal communities to develop unique forms of dealing with these problems. So our hope is that it is not for us to say, "This is the novel way in which communities have to deal with their problems," but that they will have the legal capacity to deal with them in a way that reflects their tradition. Our hope is that that is a radical proposal and that it will allow for a very different way of administering justice in these areas that will be much more reflective of aboriginal needs and aboriginal communities' historical context. In that sense, I think that is the only answer I can give you.

I think it is a very valid question, and one of the reasons we are arguing, and it may sound trite, for experimentation is that we are worried as well that we do not want to essentially duplicate the present system and have a very slow system of determining land claims with a new process. So we want to see whether it is possible to get a system which works more effectively and efficiently. We think that it may happen, but we are just not sure. We have not tried it. Until we try it, we will not know.

Mr Kormos: I am game for radical proposals. That is not at all alien to me. How about you, Mr Chairman?

The Chair: Probably a little less than the New Democratic Party, but yes, obviously, particularly in the administration of justice.

I do not see any other questions, so I want to thank the two of you gentlemen for coming and presenting your briefs and answering our questions. I am sure that you are going to find the final report as interesting as we do when we finally complete it, because it is a very interesting and new area. We are striving to try to come up with some advice to the government of Ontario in

terms of a policy on ADR. Thank you very much for coming before the committee.

ORGANIZATION

The Chair: Before we adjourn, I will say to the committee members there is one item of business that we want to address. You have with your agendas a subcommittee report on committee business which was unanimously approved by the subcommittee on committee business. We are looking for approval of the committee on the matters that were determined at that point. For those of you who have not read it, it basically deals with the question of inviting back one of the previous witnesses—which was a process requested by Mr Jackson—Michael Cochrane from the Ministry of the Attorney General.

The other issue we talked about was the possibility of inviting the Attorney General to come before the committee as a witness. The subcommittee agreed that that would be an advisable thing to do at the end of the hearings.

Mr D. W. Smith: Did you say "advisable"?

The Chair: Yes. The other issue was just to clarify some ambiguity on the terms of reference of the committee, the order setting out the mandate on this point, and the wording of that amended order is item 3 on your report.

Miss Nicholas: Before we make a motion, you know I always ask about the subcommittee's report and I would hate to deviate from my normal, customary practice. I had a question just in terms of Michael Cochrane's coming back, and I realize that his time is between the US and here. I wonder why we are specifying labour law. I remember that our questioning went beyond just labour law.

The Chair: Actually, there are two separate issues. One issue has to do with the question of—

Miss Nicholas: "And that a witness be scheduled."

The Chair: —mediation and family law, which is Mr Cochrane, and then over and above that we agreed to—

Miss Nicholas: Another witness.

The Chair: —invite an expert witness in the area of labour law.

Miss Nicholas: Why have we gone into that area? What prompted that?

The Chair: I think that discussion took place on one afternoon when you were not here. There is a very, very broad application of ADR in the field of labour law and it was thought that it would be reasonable for us to have somebody

come in and talk about how successful or widespread it is in that particular area as a model for other areas of law or otherwise, but it was just thought that it would be advisable to have somebody from that area in.

Miss Nicholas: I just wonder if we are opening up more areas of law—we have sort of focused on a few—and that is why I asked that question.

The other point was in terms of the Attorney General. Are we looking at next Monday or Tuesday or at when we resume?

The Chair: We are looking at his coming as a witness probably the week after the House starts again, and maybe the following week.

Miss Nicholas: Okay. I was just a bit concerned. I have looked at our schedule and I think it is pretty tight, and I am sure his is as well, to ask him to come next Monday or Tuesday when we are sitting. So if our understanding is later on, then I would be willing to move acceptance of the subcommittee report as noted.

The Chair: Miss Nicholas moves that we accept the subcommittee's report. All those in favour? All those opposed? Carried.

The committee is adjourned until 10 am tomorrow morning in this same room, room 151.

The committee adjourned at 1614.

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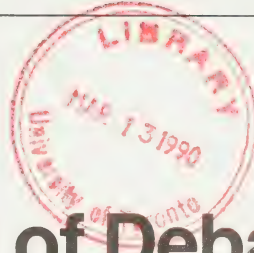
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Second Session, 34th Parliament
Tuesday 20 February 1990

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday 20 February 1990

The committee met at 1011 in room 151.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: The standing committee on the administration of justice is in the sixth day of an inquiry into the issue of alternative dispute resolution in Ontario. Yesterday and this morning we are dealing with native and northern issues.

INDIAN COMMISSION OF ONTARIO

The Chair: Today our first witness is Harry LaForme, a commissioner with the Indian Commission of Ontario. Please proceed.

Mr LaForme: Good morning. Thank you very much. I am the commissioner of the Indian Commission of Ontario. I am also a member of the Ontario bar. I practised law for 10 years in the area of almost exclusively Indian rights. I am from the New Credit Indian Reserve just outside of Hamilton. You undoubtedly read a lot about that over the last couple of days where the 14 million or whatever, how many million tires are burning. My father is presently the chief of that Mississauga band.

In June 1989, I was appointed as commissioner to the Indian Commission of Ontario. I do not know whether I was the most popular picked, but I was apparently the best of the lot. In any case, what I propose to do is to discuss a bit about what the commission does and how I think it fits in to the alternative dispute resolution process, if in fact it does, and whether or not it works.

I do not propose, even though I could, to deal with the question of alternative dispute resolution in the criminal justice sense. I am sure that there are probably a lot of other witnesses who have addressed that point, and that is not particularly the area that the commission deals with. We deal with what I term issues of social and economic justice and deal directly with communities and the shortfalls within those communities in those areas.

First, I can tell you that the commission was established in 1978, and it was established as a result of Mr Justice Patrick Hartt's northern inquiry of the time. He made a specific recommendation that something like the commission be created as a result of his examination

of the plight of the Grassy Narrows band and the Grassy Narrows area with respect to the mercury pollution at that time. He felt that the ills that community had within it could be solved through that kind of a process, which is the Indian Commission of Ontario type of process.

The commission itself takes its life from orders in council, joint orders in council, from Canada and the province of Ontario, and it is approved by the chiefs in assembly of the first nations of Ontario. As I said, that started in 1978. The first commissioner was Mr Justice Patrick Hartt. He was commissioner for some seven and a half years. Roberta Jamieson, a Mohawk Indian, who is currently the Ontario Ombudsman, was the second commissioner. She held the post for approximately four years, and in June 1989 I was appointed.

The parties represented—the process itself is called the tripartite process. It is, however, not even close to being tripartite, and the reason for that is simple. Ontario is represented at the table, generally by the Ontario native affairs directorate. Canada is represented and, for the most part, 99 per cent of the time, is represented by the Department of Indian Affairs and Northern Development. The chiefs, as they call them, or the first nations in Ontario are also represented at the table, and that is where the tripartite notion breaks down.

The Indian representatives are represented by four political organizations, namely, the Nishnawbe-Aski, or Grand Council Treaty 9, who represent a northeastern part of Ontario; Grand Council Treaty 3, which is a basically Ojibway organization representing some 20 bands in the Kenora area. Nishnawbe-Aski Nation, I should point out, represents some 45 bands or first nations. The terms are used interchangeably, first nation and band.

There is another organization called the Association of Iroquois and Allied Indians, which has its head office in London, Ontario. It represents approximately eight bands and some 10,000 status Indians. The Union of Ontario Indians represents another 45 or some such number of bands. There is then another party to the table, which is the Six Nations of the Grand River reserve, and one other group, the Chiefs of

Ontario, and I believe yesterday you heard from the grand chief, Gordon Peters.

Each of those organizations represents first nations from their various areas other than the chief's office. The chief's office is basically a co-ordinating body which is supposed to take its direction from the grand chiefs of those four Indian associations plus the chief of the Six Nations.

From a political standpoint then, we are interested in submissions at the table from Ontario, Canada and the four Indian associations plus Six Nations. They actually give the direction. The commission, theoretically, is supposed to operate on consensus. It has never been defined, at least to my satisfaction, as to what consensus means, and I suppose, to be honest, I use it in whichever way it seems to be suitable for my purposes at the time.

Issues are brought to the commission. First, let me point out how they were brought in the past. They were brought to the commission as a document. For example, somebody would put forward a document that says, "We should examine an issue of concern in Indian communities dealing with policing." The policing document then got circulated to all the parties to the process, and when all the parties approved that the issue should be dealt with, the issue was put formally on the agenda.

Annually, the agenda was approved at what we call a tripartite council. The tripartite council was made up of ministers who were involved in the process, and for the last couple of years that was the Minister of Indian Affairs and Northern Development, who is now Pierre Cadieux, and Ian Scott, the minister responsible for native affairs in Ontario. As I say, the grand chiefs were representing the various Indian interests.

Once the issue was approved as part of the agenda item, it was then what we call negotiated, that is, the goal was identified and we just kind of worked through it, identifying the problem and how the problem could be resolved and then what, at the end of the day, was required. I can just tell you that for the past 11 years the accomplishments of the commission—and I think you can appreciate almost at the outset how cumbersome that process was and how unwieldy it was because of the fact that, where you have an issue that people want to discuss, you have to get consensus from everybody there first before you can even discuss the issue, and then it is consensus all the way down the line.

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None the less, notwithstanding what I think is an almost impossible working relationship, there have been some accomplishments, if one wants to measure any kind of success with these accomplishments. First, there is the policing agreement which has a contingent of 132 what they call special constables. These are constables who are first identified by the Indian communities, Indian constables, and then they are placed through this Indian constable program on various Indian reserves. They are Indian constables. They are under the jurisdiction of the Police Act and for the most part are regulated by that body.

I think you perhaps heard some misgivings about that program from Grand Chief Peters yesterday. The policing program has effectively been in place since 1975, so I am not certain that it is appropriate for the commission to take all the credit for that, although we have been directly involved in its renewal and improvement almost on an annual basis. I will get to some of the problems with these so-called accomplishments a little bit later on.

Another document that I believe may be the most significant document to come out of the Indian Commission of Ontario is what we call the declaration of political intent. That was executed in 1985 and that document, which was executed by the grand chiefs and by Ian Scott and the Minister of Indian Affairs and Northern Development, is a document which most people feel is a recommitment to discuss issues of mutual concern.

It goes beyond that, however, in my interpretation; it goes to the discussion specifically of jurisdiction and the kind of jurisdiction that Indian communities will be left with or should be left with and the jurisdiction of the Indian people over issues like self-government, perhaps issues like social services or any other issue that the parties around the table wish to identify and resolve.

So far, the only discussions that have taken place pursuant to that declaration of political intent have been negotiations with respect to education. There is a memorandum of understanding with the Nishnawbe-Aski that was executed. That too was executed in or around 1985 and it simply says there is a commitment on the part of all the parties to discuss social issues in northern communities.

Again in 1986, there was a lands agreement, which provides for a mechanism to negotiate land claims which arise out of the 1924 lands agreement. If you are getting the impression that a lot of agreements have been executed which

commit themselves to further negotiations to get more agreements, then you are absolutely right. That is what precisely what has been done.

There was a social services agreement reached a couple of years ago dealing with what we call band rep training. Band reps, you may know, arise out of Ontario legislation dealing with child and family services. You may recall that several years ago Ontario amended its legislation significantly, recognizing cultural and traditional values of Indian people and the need to pay particular attention to the placement and care of Indian children where they were deemed members of an Indian band. It provides for standing, under that legislation, of an Indian band to appear in a courtroom where one of its children is faced with the child welfare system.

Their representative of course has been commonly referred to as a band rep. The problem that arose from that was that most of these communities do not have the resources to be able to appear in a court. You can well appreciate that Attawapiskat first nation, for instance, having one of its children apprehended in Toronto is not likely in the position to be able to appear in that courtroom and put its position before the judge in order to ensure that that child's interests are protected as they are clearly referred to in that legislation.

Hence, there were some discussions between Canada and Ontario in and around that tripartite process dealing with that. I think at the end of the day there was something like \$300 per band allocated for band rep training. I do not need to tell anyone here how far \$300 per band would go in those circumstances.

So there are a couple of other things that we are dealing with presently and we can get into those a little bit later, but those are the successes that we have and can take credit for at this particular point in time. I personally do not like to look at them as successes. I was not the commissioner. I very often represented other parties to the process at that time and I do not believe that we should take too much credit for thinking that we have accomplished a lot in that process.

Does the process work? I suppose that depends on how you look at it. I believe that the process works in one sense, that there is a forum which I think tempers attitudes, tempers approaches to problems. The commission offers that. Ministers do find their way to the table, deputy ministers are there. The issues are at least aired. Whether they are resolved is another question, but they are at least aired at that table. The complaints are heard, the issues are addressed.

Now the process has no equal in any other province, so we do not know what to measure it against. There have recently been overtures to the commission, for example, from Nova Scotia, as to whether or not a similar commission might be developed in Nova Scotia. This arises from the Donald Marshall inquiry and the findings of that inquiry. I have to say that the answer is yes, that it has some useful purposes, even as it presently exists. It can do much, much more, however.

Some of the problems of course that you are always going to find in this kind of process, first and foremost, will be adequate ability of first nations to participate, because the participation does not begin and end by coming to the table. It requires the ability to go out and hire the necessary experts to examine those issues, to examine questions of health, asbestos poisoning in the schools, for example, policing needs, the fisheries as they relate to the rivers and the lakes. Those issues have to be examined, they have to be examined by experts, and Indians want to hire their own experts and provide their own input into the process.

It does not work if Indians have to come to the table and the government of Ontario sits at the table and says, "These are the findings that we have and you guys have nothing to complain about." The feds come to the table and say the same thing. The Indians come to the table and say, "We don't have the resources to hire the experts to prove that you're wrong, but our sense is that you're wrong." That is not good enough. It cannot work that way.

So the funding is always an issue. Whether it is adequate or whether it is not—and it is always stated as being inadequate as far as the Indian representatives are concerned—we do not have any real way to measure it other than, I suppose, to be logical about the cost of experts and studies. We know what they are and the money simply is not there to do that.

The way the process works now, there is a basic core fund. There is no formula for allocating this core funding to the first nations or their representatives. Canada contributes, Ontario contributes. The budget for the entire tripartite process, including the Indian Commission of Ontario, is approximately \$1.6 million. That is shared, as I say, by Canada and Ontario. Theoretically, the Indians contribute a third to that process, but their third comes from the federal government in theory. When you add up all of these figures, however, they do not come out two thirds-one third or one third-one third-

one third. There is a basic ad hoc apportionment of funds.

Now of course in these days of fiscal restraint, there need to be better funding formulas, and we are working on that and on whether or not additional funding can be appropriated. As I say, it is protecting the existing budget that seems to be what is most important today.

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In any case, those funding requirements of the first nations, what they do with their moneys right now is provide people to come to the table on a regular basis. Once they identify the issue and identify further the direction that they want to go in it, new issues, for example, like gaming or family violence, they will now require some study as to what in fact is the specific nature of the problem, because only when you do that can you then determine how we are going to approach it to find a resolution to the problem. So they get funded up to that point where they can identify the actual problem itself and the specifics of what the actual problem is. Then it is anybody's guess where the funding comes from after that to pursue it to a negotiated resolution. That needs to be looked at. We are looking at it, and hopefully some answers will be given.

The other problem we are having is that no other ministries contribute to this process. The Department of Indian Affairs and Northern Development, for example, deals with the issue of policing and the policing program in Ontario. They have recently released a study, which they sat on for four years, which specifically says that probably the best program for Indian policing is the Indian policing program in Ontario. They also know that there are not sufficient constables to deal with the problem, yet no one can find the funds to provide what they identify as a greater need for policing. They identify that it works, that it is good. It is not perfect. None of these things are perfect, but even by their own admission it is the best in Canada.

So we need to do something with that, but the Solicitor General's office does not appear there. It does for Ontario. In fact, they conduct those themselves. The deputy minister appears at almost all of those negotiations. We certainly need more of that and more of that kind of participation from other ministries, but I can tell you, at this point in time, the only response we get from Canada is Indian Affairs, and that is simply not enough. Other ministries have to appreciate their role in this and find their way to the table. I guess that is my job, to get them there.

One other reason the process does not work, and this is a common theme in every single issue and it is one that is going to have to be addressed if the process ever will work, is the constant question of jurisdiction. You see, the first thing you have to understand is we deal with status Indians at this table. That means Indians from reserves and reserve communities. The problem that one always faces in every issue is: "That is not my jurisdiction and I'm not responsible for that. Therefore, I don't spend money in that area."

Policing: I cite policing because it has been around a long time and it is maybe the classic example. Is policing a federal responsibility as far as Indian reserves are concerned, or is it a provincial responsibility because of their responsibility for administration of justice in the province? We get that across the table all the time.

The federal government will not kick in another dime, for example, in the increase of this program, which they admit is a good program and which needs additional constables. Why? Because policing in Ontario is a provincial jurisdiction. It does not matter whether the program is good. It comes down to a question of jurisdiction, and that is absurd.

Education: We identify serious education needs on our reserves in this country, in this province. The province of Ontario takes the position at the table, "Sorry, but when it deals with education on an Indian Reserve, that is a federal responsibility." In my view, it cannot simply be that clear and that easy to do. It stops negotiations, it stops progress and it completely prevents anybody from putting any kind of useful program into place.

Is the commission an alternative dispute resolution process? Probably not, because I do not believe it has the authority that it requires to be an alternative dispute resolution process. I think, as I said earlier, that it probably prevents a lot of disputes. I do not know. I have nothing to measure it against, other than my own working knowledge of the country and other people I see across the country. Having something like the commission, I know, is an envy of a lot of other provinces. I have talked to a lot of ministers and lawyers from other provinces and they wished that their provinces had something like the Indian Commission of Ontario. It is extremely frustrating.

As I have said, we deal with things like family violence, like gaming, like fishing, like policing. That is not the same as dispute resolution in the

ordinary sense. It does not deal with contract disputes or how we divide up the matrimonial home or arrest and seizure and stuff like that. It deals with family issues: the lack of jobs, the ability to supplement your income through a fishing exercise, prevention of crime through just the presence of a police force in that community. That is what we are talking about.

So a lot of the issues that we talk about around the table are not necessarily disputes, because everybody agrees that they are issues of concern. Almost in every issue, everybody also agrees with what the answer should be, so that is not a dispute. Where the dispute arises is how you get to the answer. The dispute arises, for example, when people sit there and say, "I can't go any further because I don't believe I'm 40 per cent liable for this," in a land claim dispute, for example, where there is joint liability. "I don't believe I'm liable."

How do you resolve the question? If the federal government sits there with its policy and it says, "We get to decide the answers," and there is no appeal from that decision, what good am I? How do I resolve that? And that is true in every issue. I cannot do anything with that, unless there is consensus from all the parties. We can have an arbitration hearing, for example, if the parties agree to it; we can have mediation if the parties agree to it, but they never agree, because one can always stop the process in its tracks.

Disputes basically arise as you track through the process, and not because it is an alternative dispute resolution process to begin with. It is in land claims, however, land claims which we also deal with—not all, but some. I believe in that sense we are specifically an alternative dispute resolution process.

We deal with the claims after they have been validated or where the parties agree that they are claims which should be settled and, "Now let's get to the table and talk about how we're going to settle this and let's find out how much it's going to cost us to settle this claim." But again, as I indicated, where we could be a resolver of the disputes that arise in that, we are not because of the whole need for consensus within the process and because of some of the rules.

Ontario, to the best of my knowledge, does not even have a land claims policy. It approaches land claims on a fairly ad hoc basis and does not have any kind of specified policy and rules of the game. The federal government, on the other hand, does. Now, when one examines its rules, they should work, but they do not. The reason they do not is the federal government gets to be

judge and jury of whether or not a claim is valid, how much it is going to discount the claim, because in its view you may not have such a high degree of potential for success in a courtroom. It gets to say what the discount is, and it gets to basically set the rules as it goes along, so we at the commission can only argue and try to impress upon it that what it is doing is incorrect and improper. That is not an easy task, as you might well appreciate.

None the less, in some cases we are marching our way through it. In most cases I try to impress upon the clients, at least who we deal with and who I dealt with as a lawyer, that if you are going to settle a claim, you do not look for a fair settlement, because you are probably not going to get a fair settlement. I mean, how do you compensate somebody for land that he has not had for 150 years and he can no longer hunt or fish on? I mean, that would be fair.

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So you cannot raise people's expectations by saying, "We are going to have a fair settlement here, so let's dig our heels in and make sure it is there." It will not be fair. But what you have to do and what I impress upon the Indian clients is: "You have to decide whether or not that kind of settlement is going to impact on and improve your community. That is the best you can do. If you can do that, then you have to decide whether or not that is the kind of claim settlement that you want. And if you do not feel it is going to improve your community and if you don't think that it is going to better your community, then don't do it. You might as well take the trouble and go to court and spend the 10 years."

If the commission is going to work, and I think it can—as I say, even in the limited capacity that it functions and the constraints that it functions under, I do believe that it does work. And I think, as I indicated earlier, it tempers feelings, it gives people a chance to express their concerns. We cannot accept that as being good enough, however, because it is not good enough. We also must take it one step further and be able to provide the answers to what we identify our problems as being.

Good gracious, how can we possibly feel that we are doing anything for Indian people in this province if we say: "We've got a policing program which everybody says is a good policing program. We identify the need for at least twice the constables we have, but we are going to fight about whether or not we pay to see who gets them"? That is absurd. That happens, as I

indicated, in every issue, and that is simply not good enough.

What the commission needs is not necessarily the authority to resolve the issue completely. It does not need the authority to be the final arbiter of the overall issue, because negotiation is good, it is healthy and that is the way it should work. What it does need, however, is the authority to be able to break down impasses that occur in the process.

When a party comes to the table and says, for example, "We are going to discount this claim by 50 per cent," the commission ought to be able to take and be prepared to take that position and put it in front of a fair and independent person and say, "Am I reasonable in discounting this claim by 50 per cent?" They ought to be prepared to do that and they ought to be subjected to that if they feel that is correct.

Those are the kinds of things the commission needs to do. It needs to break down those kinds of impasses and force people to the table. If that authority were even there, I do not believe you would get those same impasses all the time, just having the power to do that—the power to do something like compelling somebody to present his studies in three months, for example. And if there are no valid reasons for not being able to table that study or that position in a certain period of time, then the commission can, on the basis of the information it has before it, make its own determination. That is their problem for not being able to put that on the table at that time. Those are the kinds of powers the commission needs.

It does not need to be able to say, "We are going to have a hearing on the overall issue and I'll decide how it is going to end." What it does need is adequate authority to be able to break down those impasses. Most of the time you would not believe the kinds of impasses they are. They are just illogical, in many cases. They do not get done. That, I believe, is first and foremost what the commission needs.

Second, dealing with the same kind of area I deal with and the commission deals with, what would be the components of a good ADR process? First of all, I am sure you know that it needs to be less structured. It cannot be. Even the commission, in some cases, was too formal. The process of getting something on the table, the process of having to put things in writing, we have broken that down entirely.

We do a lot of things informally. I think you will find that most of the people, in the seven months that we have operated the commission,

will tell you that there is a renewed interest in it, a renewed enthusiasm for it, and people are a lot more optimistic than they were in June 1989. We have recommended a change to the orders in council which appears to have been agreed to by both Canada and Ontario and approved by the Indian chiefs, and that is that an issue now comes to the commission and as long as two parties are prepared to deal with that issue, we deal with it. We deal with it until the senior officials of all governments, all the parties to the process, by consensus put a stop to it.

I can give you an example. We were asked by Canada to intervene in the asbestos school dispute on Six Nations. We went to Six Nations council and asked them whether they would agree to our participation. They said yes, and we participated. There were, during that period, some complaints from one of the other Indian organizations that said we were out of line, that we did not have approval from everyone and therefore we should not have intervened in that and that there is an asbestos problem in all Indian schools in Ontario and probably in Canada.

We could not be seen as resolving one without getting involved with all of them, and therefore we should have just sat still and not done anything. Well, I do not agree with that. I agree that when an emergency situation like that arises, I should be in a position to be able to react and provide some input. That matter was not resolved to everyone's satisfaction but it got the kids back to school and hopefully that is good. I think it worked out as well as it could have under the circumstances, but I do not believe it would have unless we had become involved.

So it needs to be less structured and of course it needs to be independent, both in fact and in appearance. One of the things I believe that people appreciate about the commission now is that I am independent. I mean, certainly people know that I am biased towards Indians, for crying out loud. I am one. But I also believe people think that I am fair, and that is what I took to the commission, and I expressed that at the outset.

I said: "If you want me to be the commissioner, I am going to tell you I am not going to be neutral. If you equate 'neutral' as being a term synonymous with 'passive,' then go get somebody else." But I promised that I would be fair. I believe that I have been, and I think the parties agree.

How can I be biased if I say, "The education in the schools on Indian reserves needs to be improved"? Well, surely to God, everybody at the table agrees with that, so I am not any more

biased than anyone else is there. How can I be biased if I say it's not a fair position for people to take at that table and say, "Yes, that school needs to be improved, the education needs to be improved, but as a province our jurisdiction ends at the border and we're not contributing one dime to that," even though we know that is the right answer?

That is not good enough. If I want to raise my voice and say that that is not a good enough answer, then I am going to say it, because it is not. It is not a good enough answer. That is the kind of approach I take to the process and yet I believe people look upon that as being fair and I think they know that I am fair.

Also, if you are going to have an alternative dispute resolution process, then you have to start thinking about it not in the status quo—new. It cannot be thought about in terms of, "Well, we've got a budget here for education, for example." If you are going to look at a process to improve education, you cannot start thinking of doing it within the existing budget. You have to ignore budgets, start looking at the problem and try to find the answer and then it becomes a concern with budgets. I understand budgets as well as the next person and I know that is important, but at the outset that cannot be the guiding force in how you examine the problem.

The last thing you cannot be doing all the time is thinking about precedent. If people are concerned that we cannot put a dispute resolution process in place because it might create a precedent that we will find we cannot live with in the future because then every other band will want it, then you will not have an ADR process. So you must be prepared to live with the results and not worry about precedent. That is exactly what is happening in education; that is happening in policing.

Canada says: "We cannot contribute another dime to this program. Why? Because it's an expensive program and if we do it here, we are going to have to do it all across Canada." The Minister of Indian Affairs and Northern Development did not want to take the asbestos out of the schools on Six Nations. Why? Because it was going to cost him \$400,000 and if he did it for the schools on Six Nations, he was going to have to do it for every school in Canada on every Indian reserve.

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That is not a good enough answer. That is not a bad precedent. Trust me, it is not bad. Health and the safety of people is not bad. As far as Indian people are concerned—and that is what I am

talking about, and particularly status and treaty Indians—there has to be a brand-new attitude and that is, it is not enough to say they are the first people; it is not enough to say that they have treaties; we have to start looking at it and believing it.

For example, when people want to say to you, "We can't provide a fishing agreement in the Kenora area because the anglers and the commercial fishermen are going to get all upset and they are going to cause us all kinds of problems," there is a good answer to why you treat Indians differently: because they were here first, they are entitled to it, and their treaties, almost in every case, say that they are entitled to it. That is a good enough reason.

Not everybody in this province gets treated equally in every sense of the word in every situation. I would like to drive a Rolls Royce too but I cannot. So there are differences, and if those differences are justified—and for crying out loud, the Constitution and history give the best justification of anything. That attitude has to change; it has to change and become more real. So in the context of alternative dispute resolution in Indian communities and dealing with Indian people, that is a prerequisite, changing that attitude.

And, of course, it has to be cost-efficient and probably has to be available to go to those communities. They cannot come here. I gave you the example of the child and family services problem. They cannot come and represent, they cannot even hire an agent. They are not entitled to legal aid for those kinds of services, so what do they do? They do nothing. So the legislation means nothing. It has all the heart in the world and it probably has all the potential in the world, but if the people cannot get to the courtroom to do it, it does not get done, so it is useless. So we need that kind of thing.

I can only conclude by saying, as far as I am concerned, the kinds of issues we deal with and the kinds of issues I am talking about, the small-political ones like education, policing, gaming, family violence, can be appropriately dealt with within something like the Indian Commission of Ontario. And I like to think we do a good job, even within the constraints that we have, but we could do a much better one. In order to do a much better one, we need to have the authority to be able to do it, but we are not going to get that authority unless people, and governments particularly, stop being afraid to give it to us and trust us. Thank you.

The Chair: Thank you very much. We do have two questioners already lined up, first Mr Kormos and then Miss Nicholas.

Mr Kormos: I should tell you that there has been a sensation about this committee that somehow ADR, alternative dispute resolution, is going to be a panacea for every injustice that has ever prevailed. Hearing you, and you are saying, yes, there are instituted alternative dispute resolution mechanisms now, and then I reflect not only on what you say but I reflect on the observations made when Bob Rae and other New Democrats went on their northern tour last year and found abysmal conditions for native people throughout the north—education, health care nonexistent, housing. Again, no standards and a political attitude on the part of the government—and one that is not a new attitude—that almost reinforces an observation that we have been maintaining our own special form of apartheid here in Ontario.

So what I am hearing is that you can have all the alternative dispute resolution processes that the imagination could ever reveal, but unless there is some political will to respond to the needs that are confirmed by that process, it is all to no end.

Mr LaForme: I do not think there is any question about that. I have often said—and I practised law for 10 years and I was a litigator, and I defended a lot of Indians who were charged with fishing offences and all of the others. I sincerely have an abiding respect for that criminal justice system and our court system in this country, but I believe that the attitudes of that system do not allow it to work for Indian people. It is a good system. I keep saying that. There is nothing wrong with the criminal justice system. It is just that because of its attitudes and the constant bickering that goes on between who is responsible for Indian people, it simply does not work.

I am finding that to be the case in all others. The issue of precedent, for example, troubles me over and over again because I am a firm believer that if you identify a problem and you know what is right, you simply do it. You do what you have to do in order to improve it. The government of Canada is making all kinds of unpopular decisions these days with respect to its budgets and tax cuts in all the programs, but it does not stop it from doing it. They do it and they know they are unpopular.

With the Indian people, I am saying the same thing. If you believe in Indian treaty rights, for example, in the area of fishing, then demonstrate

it. Just because some people are not going to be happy with you, why, in the case of Indian people when there is a segment of society out there that is going to find fault with it and have some difficulty with it, you react to that. But in other areas where you know you are going to get a reaction, and we can cite numbers of examples of that these days, it does not stop anybody from doing it.

We, as Indian people, question that all the time. How come it works one way but it does not work whenever it is an Indian issue? We look at it and we say, “Probably because we don’t control anything other than our own communities, and we do not even control them except to the extent that we try to keep walls up on our houses, and that is all.”

We are looking for that will that is demonstrated by an attitudinal change where you see sewer systems needed in communities and you simply say, “Okay, let’s do it because that is just simply the right thing to do.” It is probably easy for me to say that, and as a government you probably have all kinds of difficult problems with that, but I am just an ordinary guy who sees these things on a reserve.

I frankly cannot understand those problems, because I do not see them stopping governments from doing anything else in the face of objections when it does not involve Indian interests. I may be wrong, but I think you are absolutely right. And all the systems in the world are not going to change unless there is either an attitudinal change or the Indians are left to their own devices; set up a system whereby they take care of it themselves. Frankly, other than a separate justice system, I do not see how it can work, and I have never really turned my mind around in any other sense. I firmly believe that for improvements to be made, we as Indian people need the support and the assistance of the federal and provincial governments of this country. I do not think we are going to do it otherwise.

Mr Kormos: I suspect you are understating your insights into the problem. I am convinced that the sloughing off of responsibility and the shuffling around that issue by the federal government and provincial government is not out of a desire on their respective parts to maintain an integrity to their roles. It is opportunism. It is the kindest thing one could say about it. What is going on? The commission, let’s say, has been in existence since what, 1975?

Mr LaForme: Since 1978.

Mr Kormos: Again, I do not want to in any way take away from the commission what it has

done and what it has achieved, but in contrast to the reality of conditions for native people in Ontario, it is sad that it has been able to achieve so little.

Mr LaForme: That is correct.

Mr Kormos: What is going on? What is guiding the hand of provincial governments and federal governments—not “provincial governments,” this provincial government here in Ontario?

Mr LaForme: I suspect it is money. I think that is the problem. I hope I did not come across as understating it. I do not mean to understate it, if that is what I am doing. I generally do not react that way, but when I think of the commission, I think of it overall, for example, and I have to think in terms of different components of what we deal with.

It works both ways, this ping-pong ball effect that Indian people seem to have within this process. In education, it seems to be the province that can only do so much, because its jurisdiction stops at the border on education, and therefore it will not spend another dime.

It does not work that way in policing, where, for example, the Ontario government is the champion of Indian policing on Indian reserves. It is prepared to do what it can to improve it. It is prepared to do that, so it is hard for me to say that there is blame one way or another, because it does not work that way. All I am saying is that when one is prepared to foot the bill and go the limit, the other is not, and then it does not work. It works both ways. That is the problem.

At some point, it is just that Indian people and the lives of Indian people, and everything that affects Indian people have a component of some kind of overlapping jurisdiction of provincial and federal governments. But it seems to me that it is the dollars and cents that come into it, and if you are going to spend \$1 million for additional constables for policing—everyone only wants to pay his equal share. That is where the problem comes in.

There are other issues, of course, where I am not sure why people do not want to touch them; for example, fishing. I have no idea why Indian fishing and the recognition of Indian treaty rights cannot be issues to be addressed at a negotiating table tomorrow if we want them to be, but they will not be. I suspect that they will not because there is a fear of an anti-Indian backlash in this province that prevents people from coming to the table. That has been a hot issue, at least since I have been involved in the subject of negotiations since 1982.

We attempted a fishing agreement under the Conservative government, and that received a lot of critical comment from the non-Indian community. You see it in Nova Scotia. They granted these Indians in Nova Scotia the right to hunt deer and moose in accordance with their treaty, unlimited. They just have to practise their own conservation. You are seeing the effect of it right now. Almost daily, depending on what station you are watching, you can see some non-Indian person get up there and say: “Why don’t I like this? It is very simple. I just don’t like the idea of someone getting something that I don’t have.” That is what I am saying. You have to get over that and say: “Look, pal, that’s just too bad. These people are entitled to it by history, by law, by treaty and by constitutional entrenchment. Forget it. Cry all you want. You’re just going to cry crocodile tears for nothing.” That is what should be said to these people, but it is not.

We are having the same problem in Ontario in fishing and those kinds of issues. It is the same thing in education. It is the same thing.

Mr Kormos: What you seem to be talking about then is not so much a lack of political will on the part of the government but perhaps a lack of political gonads in terms of the courage to do it. I asked some of the people here yesterday about their perception of the Attorney General being one and the same as the minister responsible to our native people, particularly in view of some of the litigation that is taking place where the AG’s role is in direct conflict with native interests. Are you concerned about, first, the fact that there is not a single minister responsible as the spokesperson for native persons in cabinet? Is that in itself a concern? Second, when it is a combined ministerial role, it is combined with the Attorney General. Would that seem to be a strong, inherent conflict?

Mr LaForme: I suppose I would prefer it to be separate. If you were going to combine it with someone, I do not know who or what ministry would be a better choice. Frankly, I find Ian Scott very receptive. I think the Ontario Native Affairs Directorate, for example, has very good intentions and tries very hard to resolve these issues that we identify and to use the commission.

I cannot sit here and be overly critical of them, because I came to the commission with that same notion that there is no political will to do anything, but I soon realized that political will is something that must come from the government as a whole and not just from a minister. A minister can want to do things and a deputy minister can want to do things, but for some

reason, they cannot seem to do that. I am not all that familiar with the internal machinations of government, so I do not know what ultimately comes up to prevent that. I do not know how to answer that, other than to say that I cannot be overly critical.

If you want to take it even one step further, it is the lawyers in the Ministry of the Attorney General who prosecute Indian people for catching fish that the Ministry of Natural Resources arrests us for. So there is a bit of a contradiction in that sense. I suppose it is not necessarily rationalized, but I suppose he can explain it easily enough. I do not think that makes it right. There are lot of examples you can cite for that. Yes, that is contradictory; there are a lot of contradictory things that go on.

I do not see that it matters whether it is the minister who is doing it or whether it is the government as a whole doing it. What is the difference? If there were a minister of native affairs and the Attorney General's office was still sending lawyers up to prosecute Indians for fishing laws enforced by the Ministry of Natural Resources, how is that any less problematic? It is still inconsistent, in my view.

Miss Nicholas: I have, I think, two questions. One concern I have had about the whole discussion over alternative dispute resolution and that I think both of us as lawyers and a number of us here have is a loss of some of the legal protections that have been for many years built into the justice system. While some may disagree that it is too cumbersome and maybe it delays the access to justice, they have been established over a long period of time and some people feel there is protection in the justice system because there are these legal principles that perhaps ADR will not address as often.

The other thing is, a lot of people go to court or participate in a dispute resolution mechanism, and it is not so much that justice is done, but justice is seen to be done.

I had a question with regard to when you were speaking. You were talking about different parties who, if they would agree, could come before your forum as a dispute resolution but you cannot get them to agree to come before you. I wonder if we should be expanding our ADR considerations to parties who do not want to participate in a dispute resolution mechanism other than those afforded by the court, and whether we should force them or encourage them very vigorously to participate in a forum they do not want to participate in. With your reference to these individuals or organizations that may not

want to come before you or use an alternative mechanism, should we be heavy-handed with them and say that they must use alternative dispute resolution?

In my own mind, I had thought we should provide the alternative for those who want to go there or who might want to utilize it, who might want to expedite the process or use a less expensive alternative justice system, so to speak, and I just wondered what your thoughts were on that.

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Mr LaForme: I think that is absolutely true. I do not think you can force people into one process or the other. Obviously the choice needs to be there. Land claims, as an example—it seems to me that if a first nation wanted to litigate its land claim because it did not feel that a land claims forum, for example, was going to provide the kind of settlement it was looking for, particularly under the existing rules—they are not beneficial to Indians—it may want to litigate. When you litigate you receive 100 cents on the dollar. When you negotiate a land claim settlement it is something far less than that.

What I was talking about was that when you choose to go into a process, when you make the conscious choice such as having an issue dealt with at the commission, then you should not be in a position to be able to neutralize it, or for that matter, to sterilize that process. Why people refuse to arbitrate an issue within the process, for example—we take the example I used earlier of saying that the federal government wanted to discount a claim by something like 40 per cent. Under its rules it does not have to tell you why, as it exists right now, and a band has to simply sit there and say, “Okay, I guess if those are the rules you guys have, then that’s it.”

I would like to be in a position, if you are in that process, to say: “That’s not good enough. You have to demonstrate why it’s 40 per cent and we’ll arrange a hearing for you to do that in front of somebody who is fair and impartial.” That is what I see. But in terms of making it the overall, suggesting that somebody comes to the commission and you force him to come into a process like the Indian Commission of Ontario, I do not think you can do that and I do not think you should do that. I hope that has answered your question.

Miss Nicholas: My second question deals with the commission acting as an adjudicator, a mediator or a participant in the alternative dispute resolution mechanism. We have considered a number of forums here: adjudicators, mediators, private courts, lawyers, judges who

have retired acting as judges in dispute resolution. I am a bit intrigued by your suggestion that perhaps the Indian commission should take on that role. You have proven in many instances to be an excellent mediator or negotiator.

I wonder if there is a perception—again getting back to justice and justice being seen to be done—of bias with your organization, because it does deal with native rights for natives and adjudicates or wants to substantiate claims of natives and assist, in Canadian terms, the native people to get the rights that are due to them over the many years. I wonder if you are an appropriate mediator for claims or resolutions that are not between natives only, but between government, natives, individual parties, organizations and outsiders. I guess if they submit to your forum, then they are recognizing your ability to be an independent party, but I wonder if the perception would be at all of bias.

Mr LaForme: I suppose it is the same one that every Indian experiences when he walks into a non-Indian courtroom or any other kind of process. I cannot imagine a claimant coming to the commission—you are talking about a non-Indian—who could find a more impartial process, if it were designed properly, because it is not just one person making the decision. It can be in certain instances, and it does not have to be me; it can be someone else.

I am amused—a bit amused anyway—by the notion that there may be a sense of bias. Is it because I am Indian or is it because it is just the Indian commission? In either case, just to be able to state that concern almost suggests and answers the question of why Indians themselves do not feel that justice is seen to be done when they walk into every other kind of forum that is an alternative dispute resolution forum and it does not have any Indians on it, or it does not have anybody who even knows the slightest bit about Indians or their history or their feelings. It seems to me that in a tripartite process you get the best mix you could possibly get.

Miss Nicholas: Just in closing, I was not inferring that because you are native you would be biased.

Mr LaForme: No. I would be perceived as biased.

Miss Nicholas: Perceived as biased—

Mr LaForme: Yes.

Miss Nicholas: —because of your entrenchment and your long-standing work, you admitted, in the legal field with native rights. That is where your focus has been and you and the Indian

commission have advocated them for a long time. I would say the same about the women's directorate being an adjudicator in disputes that involve women. I would use the same tone, because you do have a perceived support, or in fact you are there to support the native people of Canada.

Mr LaForme: Absolutely.

Miss Nicholas: That is why.

Mr Michlash: I appreciated all your views this morning. I really enjoyed getting it from your aspect as the commissioner of the Indian commission. You talked a lot about changing attitudes. As you might be aware, I represent the Treaty 3 area and the Treaty 9 area. Yes, there is an attitude out there, an attitude that I felt came through very strongly during the hearings regarding the Indian fishing agreement. I can sum it up by one person standing up and saying, "Take my house, take my car, take my wife; touch my fishing rod, you're a dead man." That is a strong attitude. Where do we start in changing that?

Mr LaForme: I think government has to do it. Perhaps Mr Scott would not agree with me. He would say it is a joint responsibility and I suppose it is, whether at the beginning—it certainly becomes a joint responsibility at some point in the process. I think it is like everything else. It is like when government gives us a budget we do not want. It is like when the government tells us we have to have seatbelts in our car and we do not all necessarily want them. Government still does it, and until government gets up and starts saying, "Look, I know you don't like this, but that's the just the way it is; I'm sorry"—that is not a new phenomenon for government to do, but for some reason it does not seem to be able to do it in this context.

People know that when they react as those people did in your area, and they have been doing it for years for crying out loud, they know they are going to get a reaction from government. They know it is going to have an impact. When they learn that it is not going to have an impact, when those kinds of redneck comments fall on deaf ears, they will live with it. They will learn to live with it. They have to. This is not the first passionate issue that ever confronted Ontario or Canada, but the reluctance to deal with it seems to be greater than I have ever known it in anything else. We will see.

First, the approach of government has to be, "We simply aren't going to accept that." When a report of that group came to the Ministry of Natural Resources, for example—I presume that is where that report came to, out of that study

group—it should have been advised that it was just a totally unacceptable document and that those kinds of attitudes simply are not acceptable attitudes in the province of Ontario, or Canada for that matter. Do you run a risk, for example, as a politician if you say things like that? Obviously you do.

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Mr Miclash: But what they were doing in that report was sort of bringing forth the general feeling that they had heard from the non-native population as they went across the entire area. The report was very specific as to what they were hearing from the various other groups. That is in essence what they turned around and put in their report to the government. Are you saying it is unacceptable for them to have received those views and passed them on?

Mr LaForme: Those views are unacceptable. It is like a court transcript. Just because it is nasty does not mean it is not real.

Mr Miclash: But you are saying that from their point of view, those views are what they heard.

Mr LaForme: Yes. I know nothing about how that study was conducted, or what the rules were or how they selected their participants or anything, so I am speaking in a vacuum at this point. Certainly those views are not acceptable views. That point should be made, I guess it is what I am saying. It is not necessarily the approach, but certainly those views are unacceptable views. It needs to go just a little bit farther, not because the tone of the views is racial by itself—they have to be told that they are racial tones, obviously, and their comments are racial—but they are unfounded and unrealistic. They are simply not real in justification, because there has to be a place for Indian people to fish in accordance with their treaties and there has to be an ability to get an agreement.

People want to scream and yell about an agreement before they even know what is in it and that is absurd. If you develop an agreement where their access to the resource is not going to be impacted upon, what is their complaint? Is it because an Indian does not have to go and get a licence? I suggest to you that it will be that simple, that they will complain about an Indian not going to get a licence.

That is how deeply ingrained this whole notion is. You are right about “Touch my fishing rod and that’s it.” In areas like that, I know what the choice would be if there were one fish and one Indian left. I know who would be left standing.

Mr Miclash: Where do you start in changing that attitude? My question is, where do you start?

Mr LaForme: With those people you do not change their attitudes, so you as a government simply—in their case they will just have to learn to suppress their racial tendencies, because that is all you can do with people like that. What you have to do is simply bite the bullet and say: “As a government, this is the right thing to do. These are the reasons why it is the right thing to do.” You do not have to worry about finding good reasons or lawful reasons; they are there. Once you do that, people have to learn to live with it.

I put my seatbelt on. I never liked it when the seatbelt laws were first passed. I hated it. I thought all my rights were being infringed upon and everything else, but the first thing I do when I get in a car any more is put it on. You learn to live with them after a while and that is what happens. You find out ultimately that life goes on. It does not really affect you. But until such time as somebody takes a stand and stops the issue in its tracks—there is going to be fallout, for sure. There may even be some sacrifices. I hope it is not you.

Mr Miclash: Ditto. Thank you very much, Mr LaForme.

Mr D. W. Smith: You agree on one thing.

Mr Miclash: We agree on one thing.

The Chair: I have a couple of questions. First of all, I want to say that I found your dissertation very interesting, particularly from the point of view of alternative dispute resolution. You have described the commission basically as trying to work towards consensus or through consensus. I think you said one of the shortcomings of the commission was that it did not have a facility within its proceedings to refer particular disputes, if I can put it that way, to some sort of arbitration or determination within the commission. Did I understand you correctly?

Mr LaForme: No. What I said was that the power is there. It requires consensus to use it. In all but one case that I can recall in the 11-plus years of the commission, only once have the parties ever agreed to use it, and that is the independent fact-finder, I believe. The power is there in the sense that it can be done. The power is not there to compel the parties to do it.

The Chair: Would it be of assistance to your commission if any of the parties would have the right to refer an issue to internal ADR, to arbitration or mediation?

Mr LaForme: I would say that it would not even be necessary to go that far. I would say that

if any two of the three parties were to agree, then the third party would be required to attend and put his case.

The Chair: The reason I am asking the questions, I am sure you are aware of the Macaulay report, the review of Ontario regulatory agencies. There are a number of recommendations in that report dealing with alternate dispute resolution and they are along the lines you have suggested, that there be an internal process to have, in effect, a trial of an issue or a referral of an issue. I am thinking, particularly in the case of your commission, if those referrals could deal with the issue of funding, it might go a long way to answering some of the concerns you do have.

Mr LaForme: Yes, I would agree with that. One of the things that I do feel about the commission is that it is conceptually an appropriate vehicle. The dynamics of it really work when the parties get to the table. Negotiation, in my view, is the preferred method of dealing, probably with just about any kind of dispute, but particularly the social and economic kinds of issues that we deal with at the commission. That is the preferred method.

But it has to have within it the capacity to make it fair and it cannot allow itself to be sterilized by one party simply saying, "I refuse to do that." So, in that sense, I want to make it perfectly clear that I believe in that negotiation-to-a-solution concept. What I would require to do an appropriate job would be, as you indicate, that capacity to resolve the internal disputes that go on during the process. I would also agree that funding and the issue of funding could be an appropriate item for such a task.

The Chair: On the question of funding, you referred particularly to expert reports that may be provided as background or evidence in your determination. Is there an area of agreement possible whereby the parties in the commission or to the commission would in fact agree on who the experts will be? Then you are basically consolidating your funding by agreement to say: "Look, we're going to go to this one expert. We agree that this particular person has the capability to file an appropriate report." Then you are not going to have to go your separate ways and get separate funding to bring the facts to the table; in effect, agree on who the expert fact-finder will be and the funding is a common funding coming from the common pool that you have. Would that be of assistance to the commission?

Mr LaForme: Yes, it would be. In fact, that has been done in a land claim up in Blind River,

Mississauga number 8. There are several studies that were done and there were teams put together to set out the terms of reference and the agreement as to sharing the funding costs of that. There was agreement, as well, on the expert.

Of course, you can well appreciate that it is a process which constantly deals with lack of trust or no trust among all the parties, all the participants. It is not just Indians do not trust government, you know. Ontario sometimes does not trust Canada and Canada does not trust Ontario. Ontario is absolutely certain that almost in every funding issue, Canada is trying to offload on it, and Canada is almost quite certain in every instance that Ontario is just trying to shy away from its responsibilities. So there is that lack of trust. You would have to be able to take that one step further, like you do perhaps in selecting an arbitrator in a labour dispute, and that is, give parties an opportunity to come to an agreement on an appropriate person. After three cracks, if they do not, then somebody else has to name him. But, yes, that kind of process would work, but it would have to be done that way because of the dispute.

1130

The Chair: The Canadian Bar Association very recently produced a report on alternative dispute resolution, which you are probably aware of. There is a list of 25 recommendations, none of which particularly deals with the issue of native rights. There is one general recommendation and it is the last one. I am going to read it to you and ask you whether or not you can advise this committee how we can relate this particular recommendation to native issues, a resolution of disputes involving native peoples.

The recommendation particularly is that "The Canadian Bar Association urge the governments of Canada to study and evaluate the appropriateness of their current practices and approaches to resolving significant public interest issues and to respond positively to nonadjudicative models of dispute resolution."

Can you relate that recommendation to what might be appropriate in Ontario for native peoples?

Mr LaForme: It sounds to me as if they are describing the commission. As I have said earlier and over and over again, and I still say it, it seems to me the kinds of issues they were directing that recommendation at are precisely the kinds of issues I feel the commission deals with on a regular basis, and I still believe that even in the context of not having the proper capacity, the proper authority, which in my view is required if

you are going to do an adequate job or a good job, we still do a reasonably adequate job. I do not even like to say that, because I feel all we do, in many cases, is keep the lid on contentious issues. I do not want to just do that. I would like to resolve them. I think improvements to something like a body such as the commission have to be able to work; they simply have to.

The Chair: I have one further question. Professor Paul Emond from Osgoode Hall law school was a witness here last Tuesday, I believe, and he was asked a number of questions on ADR and the status of ADR in Ontario. In particular, he indicated that it is in its infancy in many respects and the issue came up as to what it would take to sort of give it some momentum.

The question was asked: "If it needs a push or somebody to stir up the pot, and you are talking about the 10 or so significant cases that would be required"—he had suggested that it needs 10 really big, significant ADR cases to make it catch on as a significant dimension of the justice system in Ontario—"I guess if I can ask you a hypothetical situation, if you were the Attorney General of Ontario, how would you do that?"

Mr Emond replied, "I think I would be inclined to look at a problem that faces the Attorney General right now, and that is the issue of native self-government and specific and some comprehensive claims, and rather than ending up with the kinds of situations that we see in Temagami and elsewhere that have become disputes of a sort that could never be mediated because the positions of the parties have so hardened, I would instruct my staff to put in place the necessary people and the necessary structures to use ADR on a case-by-case basis to begin to resolve those kinds of issues, to take one example. I would do the same thing in the environmental area."

How does his recommendation of doing a major ADR case by case, for example, native self-government, as opposed to what might come through your commission—or are the two in conflict at all?

Mr LaForme: No, I do not think they are in conflict at all. In fact, the most significant aspect, in my view, of the recent tabling of the policy statement in the Legislature by Mr Scott was the fact that it was a cabinet policy as opposed to a single minister's policy. I did not, with respect to status Indians, find anything that in my view was not something that was being looked at at the present time.

One of the things that became obvious almost at first glance in the policy, which takes it into the

tripartite process again, was the fact that with respect to status Indians under the policy, that self-government policy suggested that Ontario would expect Canada to be at the table at all of those negotiations, and if that is the case, you are into tripartite. That is us again. Now, unless you want to create an identical body next to it to deal with those, you cannot.

You see, one of the things that I find troublesome about comments like Paul Emond's is that I am not sure whether people give a full appreciation to self-government. All of the issues that we deal with direct themselves at self-government, like policing, education, social services, fishing. It is all talking about self-government, jurisdiction within that community's framework. That is what we do.

When I listen to people like Paul Emond, and I am not suggesting for one moment that he is wrong, quite often people have to differentiate between court and those kinds of issues that go to court and another alternative to deal with those issues. That is not what we are talking about.

You know, in many cases there is an ADR. As I said earlier, the commission does not, per se, deal with disputes. Disputes arise as we look for the answers, but they are not disputes at the outset. If the Indian community comes to the commission and says, "Look, we think we need to do something with fishing in our community. The fishing resource is gone. We need to have an agreement," if Ontario says, "Yes, I agree with your position," and Canada says, "Yes, I agree with that," where is the dispute? There is no dispute there.

What happens is, you find an issue and you target that issue. It is the disputes within the process that people have to think about and that is what I want to address, identifying what you want. Self-government is not a problem. Come to the table. We will identify self-government. That is not a big deal. The big deal will be what happens as you transcend the courts and find your way towards what that ultimate definition is. There is where your problems are going to be. When you say at the outset, "Canada must be at the table," that is your first problem, because you are going to go right back to what happens in every other issue that we deal with, and from day one to the day that it ends, it is going to be a jurisdictional ping-pong game.

The Chair: Mr LaForme, I do not see any other questions, so on behalf of the members of the committee I want to thank you very much for your presentation today. I am sure it will be very

helpful for the committee when we are writing our final report to present to the Legislature.

Just for the benefit of committee members, we will be reconvening at 2 pm this afternoon. Our first witness this afternoon will be John Livey,

who will be dealing with ADR in the area of environmental issues and land use planning. So I would like to adjourn the committee until 2 pm this afternoon.

The committee adjourned at 1138.

AFTERNOON SITTING

The committee resumed at 1407 in room 151.

The Chair: Good afternoon. The standing committee on administration of justice is in the sixth day of an inquiry into the issue of alternative dispute resolution in Ontario.

SOCIETY FOR CONFLICT RESOLUTION
IN ONTARIO

The Chair: The first witness this afternoon is John Livey, who is the director of policy development for the municipality of Metropolitan Toronto. He is chairman of the Society for Conflict Resolution in Ontario and an associate member of the Society for Professionals in Dispute Resolution, SPIDR.

Mr Livey, if you want to make your presentation, hopefully we will have time afterwards for some questions and answers. Please proceed.

Mr Livey: Thank you very much, Mr Chairman, and thank you for the opportunity of being able to address the committee this afternoon. I hope I can be helpful to you in your deliberations. I extend the invitation of my society to help in any way that we can further to this meeting, if you so desire.

I am representing SCRO and am here only in that capacity. I am not representing Metropolitan Toronto here today.

SCRO is the Society for Conflict Resolution in Ontario. We pronounce it "S-CRO," although you might think to call it "SCRO" when you first look at the acronym. The reason we call it "S-CRO" is we try to elicit the connotation of "in trust" as in "escrow" and show that we are basically a neutral organization, a neutral body designed to promote the concept of alternative dispute resolution practice here in the province of Ontario.

We are professionals from a variety of backgrounds, but principally we come from the planning and environmental sectors. We are committed to seeking co-operative solutions to public disputes, not just commercial disputes. We were formed in 1987. It was a joint initiative at the time with the Ontario Professional Planners Institute and the Ontario Society for Environmental Management. Since that time, SCRO has broadened its membership base to include professionals from neighbourhood justice, commercial and civil law, public health and people from a variety of Ombudsman kinds of capacities.

We have a three-part program. We have monthly meetings and a newsletter to foster the practice of conflict resolution and raise awareness of the use of alternative dispute resolution in the province. We provide education and professional skills training to groups on demand and we are undertaking research aimed at documenting and analysing the use of alternative methods of dispute resolution in the planning environmental field.

Fundamental to our purpose at SCRO is the belief that in many cases alternative dispute resolution methods can produce outcomes characterized by greater fairness, efficiency, stability and quality than is currently realized under the existing legislative scheme. We also believe that it is an appropriate time for the use of these methods as Ontario reorients itself to the changing global economy, heightened concern for the environment and the importance of recognizing the tremendous human resources in our society.

The methods that we advocate are alternatives to the current legislative conflict resolution mechanism, namely, arbitration. At this point, I want to emphasize that the alternatives we are recommending are truly alternatives and not necessarily substitutes for arbitration in all cases. We believe, therefore, that there is a legitimate role, a needed role, for arbitration tribunals like the Ontario Municipal Board and the Environmental Assessment Board in deciding and resolving disputes. However, we think too many undertakings go to these tribunals at the present time and it is a needless waste of resources.

The alternative methods we believe need further consideration are—and I hope you have had some briefings from the previous witnesses on these things—facilitation: the simple providing of the opportunity for people to come to a place and meet face to face to negotiate their differences; mediation: the use of a third-party neutral to help guide the participants in their negotiations; compensation strategies: strategies which involve a discussion of the dollar impacts, assessment of the impacts otherwise, and try to find ways that compensation can help alleviate and resolve disputes.

Independent fact-finding is usually an important part of all these methods; independent reviews are nonbinding arbitration; and finally, one term that I will try to come back to today is med-arb, which is basically a combination of

mediation at the end turning into an arbitration. The mediator basically goes from being a mediator into an arbiter if he cannot effect a settlement voluntarily between the participants. There are some examples already of that kind of model in Ontario today. The pay equity legislation basically is a med-arb model. The Municipal Boundary Negotiations Act for all practical purposes is a med-arb model.

Each of these methods alone or in combination make it possible for effective parties, rather than an arbiter, to design and recommend ways of resolving disputes without a legislative process unnecessarily encumbering their deliberations. It empowers the parties to resolve the dispute. It does not empower an arbiter to judge the substance of the dispute. That is the essential difference between ADR and traditional arbitration.

It is a voluntary self-determining nature of these alternative methods, coupled with the help of a third-party neutral, that offers promise. Properly structured at the outset, and I cannot emphasize that phrase enough, these methods can be more efficient than the contest of professional witnesses before the tribunals in Ontario. They can be fair to all parties and ADR will have the commitment of parties, since each party agreed to participate on a voluntary basis. The methods we recommend do not use a voting procedure or any other way of having the majority impose its will on less powerful groups.

The evidence for argument can be found and looked at in a number of sources, including the experience here in Ontario, and I am sure that through your deliberations you will be able to uncover some of these case studies and discern some of the experience from here in Ontario and elsewhere. We are preparing, under the auspices of SCRO, a casebook of environmental and planning cases. We are doing it in conjunction with the University of Waterloo and the Ryerson Polytechnical Institute, and we will be publishing that and making that available to anyone at cost.

Outside Ontario there is a much wider use of alternative conflict resolution methods, and there is a wide literature that has developed. In terms of public disputes, which is what we are about, the recent book by Lawrence Susskind and Jeffrey Cruikshank, *Breaking the Impasse*, is probably the best reference source available today.

Across North America, alternative dispute resolution is being used in many areas of public concern. I have mentioned environmental planning. There is widespread use now in the United

States in natural resource allocation issues, as in native issues—I see that you have had some submissions on that already; as ombudsmen, which is basically an alternative dispute resolution mechanism; in public health, increasingly the members of SPIDR are becoming—not dominate it, but there are a significant number of public health officials involved in that organization in the US now; education has always had a strong alternative dispute resolution component; land use planning, which is what I will be speaking to you a little bit more about today.

Public investment decisions: The use of what they call negotiated investment strategies to resolve disputes between regions and municipalities competing for scarce resources is a very interesting possibility for Ontario. International disputes and community justice: Probably the largest and most pervasive form of alternative dispute resolution now in the US is neighbourhood justice centres, which are basically places where people can come and resolve, through the help of a third-party neutral or panel of neighbourhood people, neighbourhood disputes.

Typically, the disputes SCRO is interested in are the large, multiparty public disputes, some large and complex, others smaller and more straightforward. Often the initial reaction to the multiparty, multi-issue disputes is to assume that they are more difficult, if not impossible, to resolve. However, as most labour mediators know, it is the two-party, one-issue dispute that is the most difficult to resolve. Indeed, the more issues, the more likely it is to be able to achieve some initial successes and generate some momentum to resolve the others.

My suggestion to you is that multiparty, multi-issue disputes is a very legitimate place to be putting some effort. Multiparty, multi-issue disputes do take more time and preparation, but the potential savings are also large and often larger than they would be in other, smaller disputes and there is, like I say, quite an opportunity there.

To illustrate the application of alternative dispute resolution to multiparty public disputes, I would like to present to you the mediation program developed in the plans administration branch of the Ministry of Municipal Affairs. I have tabled with Mr Arnott a copy of the project proposal that was done in 1987 for that particular program and a copy of an analysis that was done in the middle of 1988 on the success of the program.

I was formerly the manager in the plans administration branch when this program was

initiated, and just to give you a little context—you are probably familiar with this but just bear with me—I worked for the Minister of Municipal Affairs, who is responsible for the approvals and referrals and official plan amendments across Ontario. When I say “approval,” I mean approving those official plan amendments, and when I say “referral,” I mean sending them on to the Ontario Municipal Board for a hearing.

As part of the decision-making process, the minister would ask us, his staff, to circulate the applications from the local municipalities for official plan changes to various provincial local agencies, and a public meeting was required in all cases. Those with municipal experiences will know this all too well.

The minister receives objections and requests from the public and from other agencies, and approximately 40 per cent of these cases have an objection or a referral request. The staff are able to resolve the concerns expressed by third parties and agencies in most cases, but in our experience one case in six has ended up being referred to the Ontario Municipal Board for a hearing. The volume of applications in that plans administration branch, central and southwest, which covers two thirds of the province, is about 600 applications a year for official plan amendments.

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The daily costs of the participants who get involved in this hearing run at about \$10,000 a day. That figure that we ascribed or developed is a very conservative figure. In my work with Metropolitan Toronto, we normally assign ourselves \$10,000 a day for the preparation of a case. One can see that very quickly, with the average three- or four- or five-day hearing for these matters, the costs are quite high.

In 1986, plans administration sought to see what savings could be achieved in reducing the number of these hearings and referrals to the OMB by using alternative dispute resolution methods, and specifically mediation as a preferred method. The program was designed to identify cases, develop guidelines, train staff and generate support. It rapidly became evident that the internal cynicism that was evident about introducing this new kind of program would have to be overcome through actual pilot cases, so we set about specifically designing a program with pilot cases in mind.

In total, 48 cases were initiated by the branch and 40 were resolved. The remaining eight are either still in the process or, in two cases, they just were not successful. This demonstrates the rule of thumb, the 80-20 rule that seems to be so

typical of ADR experiments and programs, that 80 per cent of the cases are successfully resolved amicably and people are very pleased with the results, and 20 per cent either are put off to another day or are not resolved.

The cases that we dealt with range from small, in other words, four- or five-party disputes with two or three issues, to large 15- to 20-party disputes with a number of issues. They involved small neighbourhood disputes and they also involved major policy disputes between two or more municipalities. The key to success in this program was well-planned, properly prepared sessions of mutual face-to-face problem-solving using a trained mediator. I cannot stress enough the importance of proper preparation. It is the key to success for the meetings that follow.

The participants in these cases have been the greatest evidence of the success of the program and have prompted other requests in other areas. The staff, with the training that they received and the actual practice that they undertook, have rejuvenated themselves and have considerably increased their morale. This is principally because they can very directly achieve a resolution of a dispute that might otherwise have dragged on for months and/or years.

The success of the program has not been advertised widely, given the already heavy burdens on staff time. There is an apprehension in the ministry about taking a more proactive problem-solving approach and the extra workload that it would entail in the absence of changes in their circumstances and the changes that would be required at the Ontario Municipal Board, for example.

The plans administration examples are a reasonably good illustration of potential application of ADR in the planning field, but it is just one of many others. Other opportunities occur at the municipal level in many areas. Disputes over property matters, expropriations, race and ethnic relations, neighbourhood adjustment, the multitude of committee adjustment cases, zoning disputes, property management disputes, tendering and contracting disputes are all prime candidates for the application of ADR methods.

One of the first applications of ADR in the province of Ontario was the Municipal Boundary Negotiations Act, which is currently with the Ministry of Municipal Affairs. This act is an interesting example of an overly detailed process and it illustrates a common design flaw in ADR systems. I would commend you to look at the negotiations act with an eye to seeing if you could cut down on the process requirements in that act.

In the environmental area, the possible application of alternative dispute resolution is tempered by the extent to which cases would pass the test of negotiating in good faith. With the variety of issues, uncertainties and personalities one encounters in disputes, it is customary to ask the parties if they are prepared to negotiate in good faith; that is, no dirty tricks, no media gamesmanship and no socially unacceptable behaviour. Asking these questions and establishing protocols for the discussion reduces the unproductive aspect of disputes and improves negotiations over substance.

In some cases, though, the parties will not be easily counselled into co-operative, socially useful negotiations. Too often the fear of an unknown environmental consequence of, say, a solid waste disposal or garbage dump makes it problematic to bring these parties to the table. However, there are many potential candidates for the application of ADR if people are prepared to work early with the potential opponents on their interests.

SCRO has recently prepared a brief to the environmental assessment program improvement project. I think I got it right. I have left a photocopy with Mr Arnott that you may look at later.

The Environmental Assessment Act in the province of Ontario could be significantly improved both in the quality of agreements reached and in the undertakings that come out of those approvals. We also believe that we could reduce the time and dollars in making a decision.

Other potential applications for alternative dispute resolution in the environmental field are in enforcement and complaints, resource management decisions across the province and disputes over native issues.

Unfortunately, conflict is a growth industry in this province. Hopefully, alternative dispute resolution will help reduce the negative impacts of conflict. If in your deliberations it is concluded that something ought to be done to more widely introduce alternative dispute resolution into the workings of Ontario society, including the planning and environmental field, let me now table with you a one-page summary of what SCRO believes are the necessary steps that would be required for the successful application of ADR.

First, we are recommending that a thorough report be prepared on ADR to explore the possibilities, analyse the impact and illustrate successes and failures in current ADR applications in Ontario and elsewhere in North America.

I commend this committee for its efforts in undertaking this review. I think it is a very timely thing and I think it will serve the people of the province of Ontario very well.

Second, we believe that a neutral ADR commission ought to be formed with a mandate to promote and disseminate information on ADR within government and the private sector, and undertake or contract ADR system design work to create or refine existing or potential ADR legislation and programs to ministries of the Ontario government. At the current time, there are a number of ADR applications, some of which I mentioned earlier. They are disparate in their design and they are better or worse, depending on how that legislation is designed, in effecting good solutions. There is great potential in other areas of the Ontario government to apply ADR.

We believe there ought to be a service provided by the commission to new ADR programs in terms of providing client ministries with advice and guiding them through their initial learning-curve period. In Ontario presently we do not have a large pool of trained ADR professionals and it would be my recommendation to you and the recommendation of SCRO that you seek to develop a pool of trained ADR professionals by fostering training and also by starting to think, as we will inevitably have to, about professional standard-setting to ensure consumer and participant protection and to raise the expertise level.

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Finally, we believe that the commission ought to be mandated to encourage the development of ADR educational programs in functional areas of universities and community colleges.

There is a great debate in the literature about whether or not a mediator has to be trained in one particular substantive area or not. In other words, does a mediator have to come from a planning background to try and resolve a planning dispute? There are those who advocate that it is a process skill, that it can be generic and a good mediator can probably insert himself or herself into any dispute and resolve it regardless of his working knowledge of the area. In my opinion and the opinion of many others, while that latter case is possible, it is preferable to have mediators who are trained and have a training and background in a substantive area. It is that area that they are probably going to be most effective in.

One often has to prompt the participants with possible solutions and options, even though the

literature says it should always come from the participants themselves. It is very helpful for the mediator to have knowledge of what is possible and also knowledge of the terminology and lingo of any particular area.

The last recommendation regarding a neutral ADR commission is that we think, in our educational system, about providing courses in each of the major substantive areas of training that exist within the university and community college community.

Third, we believe that there ought to be rigorous testing after three years of the commission and widespread surveying of the participants to see whether or not the experiment is a success.

The funding for such a commission need not be prohibitive. We believe that some part of the funding, if not all of it, can be made by tapping into existing arbitration, adversarial or litigation-prone systems. A five per cent reallocation from these budgets would more than provide an effective neutral ADR service in the province of Ontario, and I and SCRO believe that the service would within three years more than offset its costs through averted hearings and improved empowerment to the parties.

In the long term, the use of ADR will train the participants to be better negotiators and impress upon them the importance of co-operative behaviour. Under ADR it pays to be co-operative and it pays to effect solutions between the parties. Unfortunately, our current overuse of arbitration as a dispute resolution method only serves to improve the skills of the participants as adversaries or combatants, and that is not in keeping with our hopes for a better future.

I am going to stop there and would be happy to answer any questions you might have.

Mr D. W. Smith: Your recommendation 2 is that a neutral ADR commission be formed. Who do you think the numbers of this commission should be? Are you promoting that these commission members be—I do not know—out of the civil service in some areas, old retired politicians? What are you thinking should be the makeup of this commission or do you think that every profession should be in there?

Mr Livey: I think it need not be a very large organization. You will not see in number 2 the idea that they actually deliver the mediation service, but rather that this commission be a service that basically helps people design programs and mediation or ADR services in program ministries.

There are a couple of examples I can point to. The Education Relations Commission in the

Ministry of Education basically provides a service to school boards for disputes between school boards and the teachers. While they provide the service, they also have sort of a policymaking section. If it is any indication of the size and scale of this thing, they have a director and three or four senior people, I would say, at the excluded category, senior policy analyst kinds of people, and a small staff or two or three, I believe it is, to do the logistical end of things.

Mr D. W. Smith: So maybe eight or 10—

Mr Livey: Maybe eight or 10. As far as the background goes, I think it is important that you have in the director someone knowledgeable in the application and use of alternative dispute resolution, someone who has been practising ADR somewhere in some capacity, and that you not necessarily restrict yourself to a lawyer.

Mr D. W. Smith: I am aware of a case, and I guess I am just asking for a response from you as to how you think these sessions should be held, whether they should be held in camera. I was thinking of the Sarnia-Lambton Act and the way it was carried out. It was done very, very much in camera and they did not even reveal anything to the people. In that case I felt, yes, you can deal with the issues, I suppose, on an ongoing basis in camera, but you still have to release it to the people because it does affect the people.

In divorce custody cases, where right now they seem to be all in the courts and they become very messy, in my opinion those should be taken in camera and not exposed to the public. Do you think that all of these issues that could be settled by ADR should be handled in camera, or do you think they should be all quite open? How do you see this playing out?

Mr Livey: The answer to your question depends on the nature of the dispute. Obviously a civil dispute between two parties is really the purview of the two parties affected, or family mediation on a divorce is really a personal matter that ought to be handled at that level.

For the Sarnia-Lambton boundary annexation kinds of disputes, which are public disputes, there has to be some form of public input. It is extremely important that good design work go into seeing how you handle the public presence at the table, because as I am sure you are all aware there is a tradeoff between efficiency—how reasonably quickly you can get to an answer—and public participation in these public disputes.

It is something, in the Sarnia-Lambton case, that was decided in a rather quick way at the time that first got started. Then there was a subsequent

change of heart and many of the meetings went in camera after a while. If one spends time at the beginning on designing a process where the mediator can keep people posted about the outcomes of the deliberations of the committee, one usually gets the best of both worlds: some efficiency and being able to have people let their hair down in a closed meeting, but also the responsibility of reporting back to the public on the progress in those meetings and keeping people reasonably familiar with the issues that are on the table.

There is something that an ADR specialist would caution you not to do, and that is that you would attempt to keep the parties from using the media as a bargaining tool. From the outset you would have an understanding with the parties that the media are not something the individual parties would use to the detriment of the other people at the table, just a basic piece of decency. So it is normal that those public disputes the mediator becomes the person to communicate to the public on the progress of the negotiations. It really does depend on a decision that is made at the design stage and it will depend on the disputes.

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Mr D. W. Smith: That decision is, I would think, somewhat unique. They asked the local officials to come up with a report, shall we say. But then it goes to another stage, which is legislation. To me, I am not sure that the legislation was totally what the local people wanted, but that is beside the point. At least I have some of your thoughts as to it.

Mr Livey: If I could add one more thing on that, that is an example of a med-arb. The ministry did not and does not see itself solely as a mediator, as a neutral third party. They believe they have a position to express at the table, as well as being an independent neutral, and it is a very schizophrenic kind of thing you have to do in that situation. The parties also know that at the end of the day it is likely, if there is no solution, that the person mediating a dispute is going to go back and make a recommendation on the substance and outcome of that dispute. So that is really pretty typical of a med-arb model. It influences the way that the mediation takes place, and I do not recommend it, but it is the way the negotiations act is structured.

Mr D. W. Smith: I like your choice of the word "schizophrenic" in that case. Anyway, that is history now so we will carry on.

Mrs Fawcett: In reference to your recommendation 2d, where you say, "Develop a pool of

trained ADR professionals by fostering training and professional standard setting," maybe I missed it in your presentation, but who would do that training and the professional standards?

Mr Livey: I believe the commission ought to have some budgetary resources, some training dollars, to hire skilled mediator trainers to provide that service.

Mrs Fawcett: It would set the standards, then?

Mr Livey: I do not think they necessarily should be doing it themselves, but I think they have to have the resources to find people to do that.

Mrs Fawcett: Then recommendation 3, your "rigorous testing after three years," could you just enlarge on that.

Mr Livey: I think it would be important—in fact I am sure it would happen that if Management Board of Cabinet or this committee would recommend the establishment of a commission—that an evaluation would take place at some specified period. I think three years is about the right time to see the fruits of one's labour. That is not to say you should not be doing the normal management-by-results activities on a yearly or even six-month basis. The testing should be done by an outside body like Management Board or someone outside the commission itself and the evaluation criteria should be clearly set down when they first get into the program.

Mr Jackson: I am fascinated by your reference to mediation-arbitration. I have engaged in it under the Labour Relations Act and also under the School Boards and Teachers' Collective Negotiations Act and found it a most successful vehicle.

However, I will lay that aside and ask you more directly a question about disputes in education and the Education Relations Commission, which I am sure you are familiar with at work. Just as labour conflicts fall under the labour act, the only organization in Ontario society that is exempt from the labour laws are Ontario teachers. They have their own collective bargaining act. Therefore, the equivalent of the Ministry of Labour and all of its mediation-arbitration vehicles is the Education Relations Commission. I understand they have been doing a considerable amount of work in ADR.

Mr Livey: They have.

Mr Jackson: What is your understanding of the level of expertise and its usage? Are you familiar with much of that?

Mr Livey: I have talked to them. I have talked to Dr Aim a couple of times, but I cannot say that I am intimately familiar with their workings. I do know that they have a very good track record in resolving disputes and are widely respected in the community. They offer good training as well. I sent some of my people to their training because they were holding some training that was very germane to our needs at the time. They use a med-arb model basically, although in most cases they do not need to actually order a solution.

Mr Jackson: If both parties can agree, with the agreement of the arbitrator, not to arbitrate a certain item, it can be by agreement removed from the table or modified.

Mr Livey: Yes, that would be the mediation model.

Mr Jackson: That is why I considered mediation-arbitration, which is a mouthful and a complex process, but I find it very helpful.

Mr Livey: Yes, and it is—

Mr Jackson: It is not utilized as extensively as it could be. I realize that the current Minister of Education just sent the community college impasse to mediation-arbitration, which I supported right from day one, incidentally, on that strike. Yet I sense from you that you find some deficiencies in mediation-arbitration. Can you say that about all aspects of dispute resolution, or does your personal experience lead you to believe that in certain applications it is somewhat inappropriate?

Mr Livey: It is the latter.

Mr Jackson: Could you enunciate that?

Mr Livey: Certainly. In the education relations system situation you have basically a two-party dispute and there is a well-established tradition and expectation of the participants.

I must say that the way the Education Relations Commission is funded and the way it operates creates some dependency upon that system—unnecessary dependency. The service is provided at no cost to the participants, and you will find many times a number of people coming back another day when they could be negotiating directly among themselves. So I think there is a small deficiency there. It is certainly a deficiency of success. It is because they are successful that they get people getting back.

Mr Jackson: Could I interrupt you and just refine that point? I will share with you my views, and maybe we can get right to the point of this.

I forget the exact words you used to describe its deficiency, but is that not more to do with the function that you have over 130 similar but

different collective agreements occurring simultaneously within the same bargaining year and that that sort of dance that goes on with teachers and school boards and the sawoffs, the whipsawing, provincial strategies—therein lies the deficiency but not the process of ADR?

I pose that to you because my 12 years of collective bargaining tells me that that is essentially what was happening. Why I wanted to put that fine point on it is that it strikes me that if we, as a committee, are to look at ADR, we should look beyond just simply the process, but look in more detail at its applications.

Mr Livey: Sure.

Mr Jackson: I think there is a strong argument for improving on some of our public sector bargaining models by recognizing the deficiencies I have just referred to—the reality. Let's not call it a deficiency, let's not put a value on it, let's call it the reality of how that bargaining works, as compared to, say, an individual citizen who is having problems with a certain deficiency on a brand-new automobile whose make and year we will not mention—certainly not a Ford, because there are a lot of Ford workers in my riding and I certainly know how quality-built Fords are. Quite frankly, though, you could be arbitrating on behalf of thousands of owners of that same model of car.

In fairness, I think we really need to look in more detail in terms of the area we are dealing with, as opposed to just simply focusing on the process. That is why I was a little nervous with your strong indictment of mediation-arbitration, because, in context, it works effectively in education.

Mr Livey: It does.

Mr Jackson: In spite of the challenge of 160 school boards or teachers' federations whipsawing each other.

Mr Livey: Let me just try to clarify, if I left the impression that I was strongly indicting the med-arb model. My sense of it is that if Ontario is to take the proverbial plunge on ADR, I would be very happy. However, I would rather have them do a swan dive than a cannon-ball on the entry.

All I am saying is that I think if one does look at systems design, there are a variety of situations one will encounter. There are a variety of methods available and at your disposal in applying ADR, and one ought to be cognizant of some of the difficulties or deficiencies in each of the methods. Each of the methods has deficiencies.

But it has been my observation that we sometimes go from arbitration to a pure med-arb or ADR model, pay equity being an example, and I think there is still a role for arbitration in many of those situations.

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Mr Jackson: Yes.

Mr Livey: One ought not throw out arbitration as a bad thing totally. That is really my point.

Mr Jackson: I do not consider arbitration a bad thing.

Mr Livey: That is my point, that one not swing from one system to the other, that it is in fact the combination of the two systems that would be a strength of a new design system.

Mr Jackson: Quite frankly, I had experience at the time we eventually evolved to mediation-arbitration. We had pre-fact-finding mediation, and we had to overcome the deficiencies of the training of the person who had been appointed to assist us. That is why we had to slip back, if I can reference it, out of mediation and call it pre-fact-finding mediation, and it was an awkward circumstance leading my bargaining committee in.

However, perhaps we can get some additional information on the level of expertise at the Education Relations Commission. I apologize, because of the winter storm, not being here for the subcommittee meeting, at which point I probably would have recommended that, but if they cannot come to present some information, certainly the level of expertise in Ontario in education matters where mediation, arbitration and/or alternative dispute resolution is being practised and its application in Ontario, to the extent to which the legislation allows for it to occur, might be worth sharing briefly with this committee.

The Chair: Would you be happy with a request from the committee to the clerk of the committee and the researcher to provide that information?

Mr Jackson: I am always happy to get the information that way.

The Chair: We will put that request in and hopefully we will have it very soon.

Mr Jackson: I would just like to thank John for a very interesting presentation. Thank you.

Mr McClelland: Thanks, John, for being here today. You touched on it very briefly, but I am interested in knowing the perspective on the potential use of ADR mechanisms with respect to environmental issues. You touched on it in terms

of land use planning in some of the general reference to the Ontario Municipal Board. How do you see that fitting in?

Let me tell you where I am coming from, and I will give it to you, in effect, from the citizens' perspective. They by and large feel that they are up against a system in terms of the sophistication required and the amount of money this often requires. I would like you to expand on that and suggest from your experience, and your colleagues in municipal government, what kind of mechanisms may be useful in resolving some of those issues.

Particularly the citizens' groups and the neighbours have a real sense of almost being overwhelmed by the scope and the magnitude of the task at hand when they are confronted with areas where they feel they have a significant vested interest in their own communities. I would like you to share some of your background experience and if you have considered ADR.

Mr Livey: We certainly have considered ADR in that, and there have been attempts. If you have not had information from someone in the Ministry of the Environment on ADR applications in the Environmental Assessment Act process, you probably should. There have been some aborted attempts in that field, the Pauzé landfill site being one of them, and the late insertion of a potential mediator in the Halton landfill would be another.

A couple of context things: The Environmental Assessment Act is a very necessary piece of legislation in Ontario, and nothing I say is intended to convey the message otherwise. However, it is another act that suffers from process overkill. You basically have to give some notice to blow your nose under that act right now. One step after another just adds up to an extremely long and difficult process, and it puts an awful lot of demands on existing staff.

Until recently, there were no guidelines available to the public and/or the proponents on public participation, and still the ministry clings to the idea that it is proponents' responsibility to undertake good public participation but is reluctant to actually recommend or advise as to what kinds of public participations would be appropriate in which case, so the proponents in some senses are left floundering about what it is that they ought to be doing about public participation, knowing that there is an act and a hearing process to follow that will analyse every decision that they make from A to Z and backwards to A again. So they get a little paranoiac about it at the beginning.

The residents' groups, heaven knows, are completely at sea, if that is the right analogy, or very extremely concerned about the possibility of the location of an undertaking such as a waste disposal site or something in their neighbourhood and are justifiably concerned about the impact that will have on their children and on themselves. There is enough newspaper coverage of burning tire dumps and other things that happen on a seemingly more frequent basis to give them that kind of apprehension.

My suggestion or recommendation or observation is that there is not enough time spent at the front end on trying to decide what it is that needs to be done reasonably to get to a solution. I can also speak from the municipalities' point of view. The municipalities have to do something, and they are extremely frustrated with the Environmental Assessment Act, because it takes them years to get to something that they have recognized they have needed to do for years, yet it is in the front end that the potential agreements and savings can be realized. If an ADR process were put in place, I believe that there would be lot more time spent at the front end and an awful lot less time spent in trying to lever the process and argue that proper notice was not given improper notice was given or it was argued in front of the expert panels that this type of pollutant is going to cause this carcinogenic effect in X number of rats and people.

I will just share this with you. I was impressed by Thomas Berger when he talked about the wisdom of expert panels on the Mackenzie Valley pipeline hearings, where he had 23 expert engineers talking about how high the berm ought to be in which they placed the pipe above the permafrost; 23 of the experts said it only needed to be a metre or two above the permafrost and it would be fine, it would not crack, heave or otherwise cause problems. That was important for some of the environmental groups that were concerned about caribou passage over the thing.

He had one further witness, the 24th witness—actually, he was inserted about halfway through the process—who suggested you needed a 10-metre-high berm. The reason was that the permafrost at a metre would probably sag a little bit and it would crack the pipe. All the other 23 distinguished experts said that no, Mr X, the 24th participant, simply was in error in his judgement and in his engineering. Berger had the good sense to require a two-year moratorium, over which two winters they actually tested the two designs, and it turns out that the 10-metre-high berm was required; the one-metre-high berm cracked.

That is the kind of message that causes enough concern, and it goes to show you can spend as much money on expert evidence and still not get a satisfactory answer necessarily. That kind of message, I think, is important for the ratepayers and people to understand too. There is no perfect world, nor will a certain level of expertise and effort always get you to the end, that a hearing is not always the perfect solution.

I think if we were to take and flip around the dollars and energy spent at the back end—and even reduce it—and put it to the front end, environmental assessment could be greatly improved. But it will take a fairly significant effort on the part of the Ministry of the Environment to redesign that process in that regard.

Mr McClelland: I would like your reflections. It is something that we have all canvassed and thought of from time to time, I am sure, being involved in this process and the discussions pertaining to the committee at the present time, but the question at first blush seems almost simplistic, if you will. I would be interested in your reflections on how you build into any kind of alternative process a safeguard from its evolving to become simply another extension of a burdensome, cumbersome—ultimately replacing one system with another. It seems to me that human nature is such that we are going to have to continually turn our minds to that as we consider various ADR models. I would be interested in your reflections on how one might go about getting to address it up front, to the extent that it is humanly possible, if in fact it is possible, precluding the natural evolution towards a—

Mr Livey: Bureaucracy.

Mr McClelland: —very sophisticated bureaucratic system in its own right.

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Mr Livey: Okay. I have two answers for you on that. First, over the longer term, education and sort of a concerted effort on education would be an extremely important part to change public attitudes about how one resolves disputes. You know, the Perry Mason model of watching TV and deciding that that is how we resolve disputes in society is one that many people have, and expect to have, when they have a problem. I think our neighbours, for example, talk less to each other than they used to and that is why you have more phone calls to city hall about barking dogs instead of the guy walking next door and saying: "Your dog is barking. What can we do to solve this?" I think we are a more litigious kind of society.

So I think education, first and foremost, has to be reoriented to sort of portray some of the successes of an alternative way of resolving disputes. Partly, we just are not as able to deal with others. We just do not talk to each other as much as we used to. I do not think we dialogue enough.

But, second, I think I really share your concern about the bureaucracy in this thing, and that is one of the reasons I talked about that dependency thing earlier. I think that if you offer a service in any program of any ministry for ADR, there should be a portion of the fees picked up by the participants. I think it should at first be reasonably small to allow people to gain entry and feel comfortable, but after there is some success and it is evident that the thing works, I think the scale should be adjusted to ultimately, hopefully, get to a situation where the parties themselves fund the third-party neutral, because really, you are trying to argue for a system that ends up in most cases having the parties simply negotiate between themselves without the help of a third party. They should be skilled enough and confident enough to do that, ultimately. That is going to take some time. I mean, it happens now, but it could happen a lot more. So I think there should be a sliding scale on providing the service, and I think that in itself would offset the need for bureaucracy.

Mr McClelland: Just a little bit of a supplementary to that. This may be sliding off into another area, but has SCRO ever considered the prudence or the wisdom of intervener funding and the impact it has now in the present system, whether it ought to be extended or looked at, given a sober second look?

Mr Livey: I am not sure of your question.

Mr McClelland: You are advocating, in part, a user-pay concept.

Mr Livey: Right.

Mr McClelland: Our government presently has made some significant moves towards intervener funding. We are picking up, basically, the cost for participation in some fairly complex situations. I am just asking if SCRO has considered the wisdom of intervener funding on a broader scale. Maybe you have not turned your minds to that as an organization. I would be interested, if you have, what your collective wisdom has been on that.

Mr Livey: I missed the adjective "intervener" earlier. We have put our minds to it in the submission that I have left with Doug Arnott on the environmental assessment program involve-

ment project, and we say there, first, that intervener funding has basically redressed some of the power imbalances in the way the environmental assessment act works now, but really it has sort of thrown gasoline on the fire. It is spending resources and encouraging, in fact, more adversarial effort in a process that need not be as adversarial.

So we would recommend that in fact some of the funding for this ADR commission would come from intervener funding. Some proportion would come out of there, some would come out of the Ontario Municipal Board estimates, some out of the Environmental Assessment Board estimates, and it would not take very much like that to staff up a reasonably small-sized group commissioned to issue ADR procedures. I think it would be money much better spent.

Mr McClelland: Thank you.

The Chair: I do not see any other questions from the committee members, so I have a couple of questions of my own. Mr Livey, as chairman of the Society for Conflict Resolution in Ontario and an associate member of the Society for Professionals in Dispute Resolution, would you say that Ontario at the present time has a discernable and/or broad policy with respect to alternative dispute resolution?

Mr Livey: No, I would not.

The Chair: Would you have any recommendations for this committee as to what form a broad policy should take or what the process should be to establish such a policy?

Mr Livey: I think this process that you are going through right now is a very good first step. I think that you also want to ensure that there is some public debate, dialogue, on any of the recommendations that you bring forward. I am assuming that will take place. In terms of policy itself, it may be appropriate for the committee to consider recommending that alternative dispute resolution be considered by those bodies now charged with the responsibility of arbitrating or otherwise dealing with disputes and have them at least give you an indication of their present circumstance and what it is that they could do to think about introducing ADR into their processes.

I would suggest, though, to you, and this is the thrust of our submission, that there be a central group of some sort, a central agency not assigned to any particular line ministry, for reasons of consistency and fairness in the application of that concept across Ontario's ministries.

The Chair: On that last point, I want to refer you to some comments that were made by Gordon F. Henderson, who is the past president of the Canadian Bar Association and who is very active in this whole area of ADR, particularly in the civil area. He indicated as a recommendation that there should be a framework developed by government which would facilitate private arbitrations. In further questioning, he indicated that there should be some sort of self-governing body established for the whole area of ADR—mediation and arbitration—similar to the Law Society of Upper Canada or the College of Physicians and Surgeons of Ontario so that the profession, if I can call it that, would be self-governing, would have rules, ethics, require a certain minimum level of training. Do you think that would be advisable?

Mr Livey: I think that would be advisable. I think it is inevitable. I think you will get to that point in Ontario.

The Chair: You had indicated that there is no pool of trained ADR professionals at the present time.

Mr Livey: I indicated that there was not a large pool.

The Chair: A large enough pool at the present time, and I want to relate that comment to the legal profession in a sense. Are you a lawyer yourself?

Mr Livey: No, I am not.

The Chair: There have been some comments from a number of witnesses that there is some tension between the legal profession and people involved in ADR who are not lawyers or who are indicating that certain professional training should be available. I want to refer you to a comment that was made by Professor Paul Emond from Osgoode Hall Law School. He was referring to that tension, and he indicated:

"Indeed it was only two years ago that I asked a friend who was practising environmental law to contribute to the environmental mediation newsletter, a short piece. He wrote a short a piece and the piece was very critical of environmental mediation and critical principally because, it seemed to me, that he saw environmental mediation as a means of threatening his livelihood."

He goes on to make some additional comments. Do you sense that this is fairly widespread among the legal profession?

Mr Livey: Let me put it this way. I think in nearly all professions people have a difficult time with concepts that they are not entirely familiar

with, and I think that is as applicable to the law society as it is to any other profession. The training that lawyers receive tends to be adversarial, and developing those skills is an important part of their background. There are courses and there are efforts and there are people in the legal academic community who are skilled in ADR methods, and it is becoming part of the accepted curriculum to show law students that there are other ways of resolving disputes. I think the law society will change with the times, as other professions do. I think there are in the planning field, for example, enough adversarialists here now too and yet you often get the reforms, the converts in planning, just as you do in law. It is really a question of how we can make apparent to all practitioners the benefits and opportunities in ADR. I would not try to single out one particular group. It would not be my place to do that.

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The Chair: Can I ask you what your academic credentials are?

Mr Livey: I am a town planner. I have a master's in planning from the University of Toronto.

The Chair: Do you think that lawyers, graduate lawyers, practitioners, are perhaps more qualified than maybe other groups, but not fully qualified?

Mr Livey: I do not think that they enjoy any particular special training or status that puts them in a pre-eminent position to be involved in ADR.

The Chair: I will ask the question another way. Presumably if there is going to be some type of certification or some type of standard for people in ADR, it would draw from different disciplines. In other words, you would have sort of a training or academic exercise that would draw from graduates of business schools, psychologists, lawyers, etc, and they would really enter into a primer course, if I can put it that way, dealing with this whole area of ADR. I will ask you that question initially. Second, could you describe the nature of the training academically or in practice that a graduate lawyer, a PhD psychologist or a master's in business administration would require, before he could embark as a professional mediator or arbitrator?

Mr Livey: To answer your first question, I do believe that it would be encompassing a broad background that one would look for in recruiting people with the aptitude to be mediators. There is a certain inherent talent, I think, that mediators share in listening and in having empathy with the participants in a process and in the ability to be

nonconfrontational in their questioning. I do not think that is germane to any particular academic background, so I think they can come from any place.

In answer to your second question, I think there are two things I can recommend to you. First, SPIDR, the Society for Professionals in Dispute Resolution, in the United States, is very much in the process of standard setting. It had been sort of a vexatious question in the mid-1980s, but it has now become something they just have to do and are in the process of setting standards for their members and having them enshrined in legislation in states across the United States. They have a code of conduct and a minimum requirement package that I think you probably should avail yourself of. If you do not have their address, I can make it available to you. It is Rhode Island Avenue in Washington DC.

The elements of the course that they give require normally a university level of academic training in humanities or science, or basically any university background, but also require a set of training sessions that go over the conceptual and analytical skills that are required and also provide simulated games, games simulation or gaming that tests and gives feedback to the participants and develops their skills. There is a heavy dose of psychology and sociology required for training of mediators. There is also, of course, heavy emphasis on professional ethics that ought to be included in any course that would be given. I commend to you the SPIDR requirements.

The Chair: Do you think that the self-governing body that we referred to before would be the appropriate body or agency to set the standards?

Mr Livey: I think you are probably going to have to design an enabling piece of legislation that embodies minimum public standards in its objectives and then leave the more specific operating standards to the governing body, if that is the recommendation.

The Chair: I have just a couple of more questions, essentially relating to the issue of intervenor funding. As you are aware, the province enacted the Intervenor Funding Project Act essentially to provide the possibility of funding in matters before the Environmental Assessment Board and the Ontario Energy Board. However, once the funds are made available to the interveners, it is my understanding and my perception that the process is still adversarial in nature. In fact, Professor Emond indicated that under the Environmental Assess-

ment Act once a matter is referred to the Environmental Assessment Board, it has seized with that particular process and the board itself has to make the determination. Do you think that there is some in-between step where we can marry the issue of intervenor funding, the public interest being protected and more emphasis on alternate dispute resolution techniques, rather than going through the adversarial system to the end of the limit, particularly in the case of the Environmental Assessment Act?

Mr Livey: I think there is, and I think it does not require a major change to the existing legislation or process. What it really requires is a good program because the nature of our alternative dispute resolution really is voluntary. If the funding under the Intervenor Project Funding Act and the mechanism through the Environmental Assessment Act recognized that a step aside in the normal process was a legitimate option for all the parties and there was some person or body that could discuss with the participants what it is they can expect out of that process, what it is that they stand to gain or lose, allow them to make some judgement on whether they want to participate freely and then allow them to undertake the alternative dispute resolution with the help of a trained third party, I think you would effect a major savings there.

The Chair: I have another question with respect to intervenor funding and it relates more directly to your professional qualifications as a planner. There is an amendment to the Intervenor Funding Project Act, which has gone through first and second readings in the provincial Legislature, to include as one of the eligible boards or applicable boards the Ontario Municipal Board on major matters that go before the Ontario Municipal Board. Do you think that is an appropriate extension of use for intervenor funding?

Mr Livey: I think you have to come to some determination about whether or not it is expected that the Ontario Municipal Board or the EAB would be the third-party neutral. I have talked to the chairmen of both boards on this and both were uncomfortable at the time about having the service provided through their auspices. Both though, I think, were open to the suggestion that it could happen through somebody else's auspices. Frankly, I think it is possible for them to provide the service. It would have to be described as a separate entity of some sort, but it need not be completely independent of them. I think it could be structured under their wing, if they had the inclination to do so.

The Chair: Mr McClelland mentioned the issue of broadly based public interest groups in matters before the Ontario Municipal Board being absolutely swamped by the process, the expense, the number and nature of technical witnesses, etc. Is there a role for the public interest to be represented before the Ontario Municipal Board through some sort of intervener funding and, once again, is there some trigger that could be introduced that would try to direct the parties to some form of ADR?

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Mr Lively: In response to your question of whether or not there should be or could be some public interest represented through funding through a municipal board hearing, I think that is an excellent remedy for the lack of that ability before the Intervenor Project Funding Act came along. I support the Intervenor Project Funding Act to the extent that it empowers parties who do not have the resources necessary to advocate properly on behalf of what they perceive to be the public interest.

In response to your second question, yes, I think there is a trigger or a time in the Ontario Municipal Board system when the Planning Act system would be, and is, with the Minister of Municipal Affairs and the decision that he has to decide whether to send something on to a hearing. He has an opportunity at that point—in fact, that plan's administration mediation project is exactly where that trigger comes into effect. He has the ability to make a judgement about having it sent a different route, or asking the parties whether they would be interested in having another route explored before it goes any further. There is also an alternative of having him refer it and schedule a hearing but still send them off on the ADR route because there is an advantage of, as many people know, having a ticking clock working to help the parties move towards an agreement.

The Chair: Are there any further questions from any committee members? On behalf of the committee members I want to thank you, Mr Lively, for your presentation. The material you filed with us I am sure will be very helpful when we prepare our final report for the Legislature, so thank you very much.

CANADIAN DISPUTE RESOLUTION CORP

The Chair: Our next witnesses are from the Canadian Dispute Resolution Corp. I will ask them to come forward. Brian Gardiner is founder and president of the Canadian Dispute Resolution Corp, which has developed a mediation

format which is generic in its application. He also established insurance mediation procedures for the British Columbia International Commercial Arbitration Centre, and he has written and lectured widely on mediation, particularly in civil litigation. I understand that Joan Fair, who is the director of the Ontario office, is in attendance with him. Mr Gardiner, please proceed.

Mr Gardiner: Ladies and gentlemen, first of all I would like to thank you all for inviting us here today. There are a number of individuals, Mr Kormos and Mr Jackson, whom we have spoken to before. If you gentlemen will just bear with me, this is a bit of an old movie but we have changed the plot a little bit for you.

Mr Jackson: I can always plug into the French-language service to hear your interpretation of it.

Mr Gardiner: As mentioned, Joan is with us here as well. Joan is in charge of our Ontario operation and brings a law background as well as a business background, so I thought it was important that she attend to be able to offer her insights into the field that we are about to discuss.

In order to set the stage for your involvement and some questions and discussions a little bit later, what I felt would be the most useful approach would be to explain how the system that Canadian Dispute Resolution is currently using within the field of civil litigation operates. With that background in place, perhaps we could explore how that might fit more appropriately within the broader spectrum of civil litigation as a general topic area here in Ontario. If you will bear with me, I would like about 15 or 20 minutes up front to run you through the basic working model that CDR uses, and I will leave as much time as we can towards the end for your discussion.

I presume everyone has our material. What I would like to do is take you through the information in tab 2, which explains essentially how our operation works. There is additional information under tab 3. There is reference material, there are some examples of cases that have gone to mediation in tab 4, and there is also reference material at the back. If I can ask you to put the reference material and other stuff aside for the moment, we will get a chance to take a look at that in some detail.

To give you the background, essentially Canadian Dispute Resolution is an organization that is now in its third year of operation. We are a private company that provides both mediation service and mediation training. Our specific area

of interest is civil litigation. The field of ADR, as we all know, encompasses arbitration as well as mediation but our expertise and my comments will be limited to strictly to the mediation portion of this field.

I mentioned that our program includes both training, on the one hand, and physically providing a service, on the other. The reason behind that is very simple: We are finding that those two ingredients combined are essential for a program such as ours to be effective. It is indeed effective. I expect you have also heard some of these comments from others, but in the last two and a half years our company has been involved in the physical management of more than 200 civil litigation cases. We have enjoyed a track record of settlement rates in the mid-80s.

I think it is important, however, to also recognize that the cases that are being mediated are indeed some of the more difficult ones, and the fact of that 84 per cent, perhaps, is not all that much different from the numbers you are hearing in terms of the overall settlement rate outside of the courtroom. I think it is important to appreciate that the kind of cases that are coming to mediation are those that are not likely to settle, in some instances, prior to a courtroom. The other thing that is occurring is that the mediation process is allowing the parties to settle those cases more quickly. That, in turn, is the kind of thing that is going to help, I think, clean up, to a certain extent, some of the waste that is currently within that civil litigation system.

The other aspect of our business that I think is important in mentioning here regards the number of cases that have come to us in the past. In the past nine months here in Ontario, we have had more than 500 referrals for mediation from within the insurance industry. Not all of those cases go to mediation, but it is interesting to note that the very referral of the case to our organization has precipitated some settlements. The number I have referred to here is that, in the last count at the end of January, 121 of those cases have indeed been settled directly between the parties during the time that we were working on the file with our efforts to bring the parties to a settlement table. So there are some interesting side-effects that go on when a file is referred to a mediation program or a mediation service.

The training side of our business is also very important, as I mentioned. In the past year here in Ontario we have trained 120 individuals in the process of mediation. I will explain more about the details of the training program for you a little bit later. I heard some comments from the

previous speaker that nonlawyers are getting involved in the mediation process, and we are indeed finding that the legal profession and the legal background in itself is not the only prerequisite or useful background that lends itself to this process. We are having some fine success with people who are not lawyers, although the biggest background is within the legal profession in the number of people whom we are using.

The other point that I want to make at this stage is that it is the putting of the mediation into practice, the administration part of the program or the process, that I think is the most important thing to spend some time discussing, because the idea of mediation, as I am sure you are all aware, is not new. It has been around a long time and, generally, it makes a lot of sense. But how do we physically put it into place? What steps do we take? How do we make it happen? I would like to comment on that and some of the things that we have done in the last couple of years.

To lead into that, if I can refer you to page 4 in the next section I want to provide a little bit more background so that this will make some sense to you. The things that in our view are driving the development of mediation processes are linked in part to the traditional forms of negotiation and litigation. That is what this graph here illustrates. What I have laid out here is typically what happens in a civil action. I am going to talk mostly about insurance, but I would invite you to take this into other areas of civil litigation.

Typically a situation will begin with party A and party B discussing the dispute, one with another. You have a plaintiff on the left-hand side and an insurance adjuster on the other side. Now, if that discussion does not bring the matter to a conclusion and the dispute continues, then each side in due course refers the problem to its respective counsel. You can appreciate then what happens. The negotiations from that point forward involve more people.

If you take a closer look at a situation, in an insurance context or otherwise, you will also find there are even more people involved. Behind the insurance adjuster will be other individuals within the organization. The same thing could apply to other bureaucratic organizations. It could be several lines up the bureaucracy where the real decision-maker stands.

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The same thing applies in an insurance case, especially on the other side of the equation. You will have behind a plaintiff, for example, in a car accident or in an injury situation, someone else within the family circle, perhaps a father, a

mother, a friend, a brother or a cousin. Sometimes it is someone who has recently taken a law course and has all the answers and that is an influencing factor that is complicating the negotiation process. So you can appreciate what is happening now. In conducting these negotiations a position may be adopted by a manager within a company, who, in turn, relays that position to an adjuster, who then passes instructions to that lawyer. The defence counsel, in turn, puts a proposal to the plaintiff's counsel and so on. The net result of that negotiation process is not very timely and it is very costly and very difficult to manage in a complex case. You can appreciate, also, that the opportunity for lost communication is everywhere. By the time the message leaves one side and arrives at the other side, the real underlying issues have been lost somewhere in the translation.

If I can turn the page to page 5, the mediation process is essentially as laid out here. The program that we are using converts that previous scenario to this scenario. Let me explain how this process works. Essentially you bring the key parties together with their respective lawyers. The individual participants have—and this is very important—full decision-making authority on site during this mediation conference. The insurance company does not send a messenger boy here. They must send somebody who can do the deal, make a decision, given the development of the negotiations during the course of this process. The same thing applies to the other side. The plaintiff comes with a mindset ready to complete the negotiations and wrap the whole thing up before the day is done.

One of the other things that make this work is preparation ahead of time. The parties come ready to go to work, ready to sit down at the table and sort out their differences. That is done in a practical way by way of a submission to our organization ahead of time, a brief summary report outlining the issues in the case, two or three pages in length. We do not get full, complete briefs. Just tell us what the problem is here and give us a rough idea of what is at stake. That information in due course is provided to the mediator before the meeting takes place. You can appreciate some of the advantages of that in terms of getting people organized, on track and ready to do business. Already they are starting to move towards each other because they are obliged to get some of that information that has been sitting around on their file organized and in shape.

The logistics are prearranged: the date, the time, the place, the duration of the meeting. A comment about duration: We found that for a typical personal injury civil litigation matter, anything up to about \$100,000, we set aside one single four-hour mediation conference. Experience and research has shown us that that is typically what it takes. The beauty of that is that the parties come in with a time frame to work towards. It manages the process from a time management point of view, and it also has an effect on the actual negotiations. What often happens, as you know, in negotiations is that as the clock starts ticking away, the 11th-hour scenario starts to unfold, and that does have an effect on the actual negotiations themselves.

The other ingredient here is the mediator, and naturally that is an important piece, and probably the most important piece, in making this whole thing function. We will talk a little bit more about that later. But I wanted you to appreciate that when we are discussing mediation within the context of our program, that is more or less what a mediation conference is composed of.

Getting back to the training side of it and the development of the mediators themselves, obviously the quality of the mediator is going to be important in achieving ongoing success of this kind of program. Finding and developing the right kind of people is a major undertaking as well. That is where the training side fits in. Our organization has trained, as I have said to you, a number of people here in Ontario. We will continue to do so. We use the training program as an entry point into the system, and it is only the beginning, because naturally one does not become a mediator simply by taking the program. By managing and working with those individuals on a case-by-case basis, we are then able to allow experience to kick in and the individuals to improve their skills over a period of time.

Our organization is involved in monitoring the results of the mediation and providing ongoing support to the mediators over a period of time. This has been our solution, I guess, to this whole question and issue of licensing and qualifications, because that in itself, as I heard from one of your earlier comments, is another major field that is very, very difficult to put a handle on and come to grips with.

Our approach is a practical one. We are a company that is servicing people who have the use of this service and this process, and it is up to us to satisfy them by way of getting them results, and that is my reference here to the marketplace

as being the standard-setter for mediators in that sense. If the mediators are capable and if our system is working, then we are going to have repeat business from a particular set of clients or from a marketplace. It does indeed provide to us a standard of performance without having to get into the nitty-gritty of having to lay those down in a way that otherwise would be very difficult to achieve.

Just to finish off my discussion about the administrative side of it—we have talked about the training of mediators—when I talk about the administrative part of our program, essentially what I am dealing with is the steps that our company, as a neutral organization, takes in putting the parties together in such a way that they can get the job done. I mentioned that that includes some preparation ahead of time.

One of the other things that we deal with to ensure that the process is effective for the parties, in addition to the authority level and some of the logistics, is the legal representation aspect as well. In other words, you notice in our model that there were lawyers there, and in our experience, having legal representation in a case of any consequence, in a civil matter of any consequence, is a very important decision that must be made and one that should be made with care. In fact, the lawyers play a very important role in our system in terms of assisting the parties to negotiate their own settlement.

Our company is in a position as well to provide ongoing work in terms of collecting data, providing feedback—first of all, collecting feedback from the participants—gathering data and making that information available and useful to the mediators, to the insurance companies who are currently using this kind of service and to other organizations, perhaps organizations such as this, where that kind of data would be very useful in terms of analysing and assessing the results, learning from our experience and hopefully improving the system that exists today.

Just as a word of caution, as I mentioned here, going slowly, taking care and putting quality into the workmanship of a mediation conference by way of the work beforehand, during and after and the careful selection of mediators—when those things are done well, and I am going to show you in some of the results here, the results can be indeed very impressive. The parties will come away with settlements in situations where they did not feel it was possible, walking into the room. So we know it can be done, and now the question is, I guess, from our perspective, how to

make some of this kind of material, these kinds of ideas work in a broader spectrum.

I have some further discussion I would like to get into in terms of the implementation, but I think before getting to that, I have covered some fairly broad areas here very quickly, and it might be useful just to stop for a few minutes and see if there are some questions about clarity that would be helpful here.

The Chair: Are there any question from the committee members at this stage? I guess you can proceed, Mr Gardiner.

Mr Gardiner: Fair enough.

The kinds of issues that have arisen in the last number of years as we have been developing this system, I would expect, are the kinds of questions that to a certain extent this committee would want to talk about. For example, what kinds of cases are suitable for mediation? When is the best time? How do we get them there? Should mediation be voluntary or mandated? And to what extent is the private sector role to be explored, versus the public sector? In my comments I have raised some discussion about these issues in terms of what kinds of cases and when, a pretty fundamental question when one starts to think in terms of, "Well, how do we physically make this happen?"

There are really, when you get right down to it, two main prerequisites for the selection of a file or a civil dispute for mediation. In our view, first, there needs to be a desire by the parties to in fact resolve the case. Without that, the process is not likely to be all that successful.

Second, the parties require sufficient facts to get the job done. That is pretty general, and if you like, I can be more specific as you think about that. The question of where within the litigation stream it fits tends to follow. In our view, in some cases a certain amount of litigation is required before those prerequisites can be met.

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The real decision, however, as to where and when a file would be suitable to mediation in the final analysis, in our view, rests with the parties. It is really they who know whether or not they are ready to settle and whether they have enough information. So that poses the question, how do we get those parties to the table and use this process?

Our approach is this. Recognizing that that is essentially their problem and their decision, we make our service available to either side at any time during the life of their dispute. What we find typically happens is that one side is ready before the other, and the way they are then able to

proceed is, we have one side refer to us a request for mediation. They file this request with us. Our organization at that point will contact the people on the other side and begin a discussion with them to find out to what extent they are ready, and if they are not ready, when they will be or whether they will ever be ready. It is through that kind of intermediary process that we find the most opportune time for these parties to come together. So it is kind of finding that right window, that open opportunity, for the parties to bring themselves to that same set of decisions where they are ready to proceed.

On the question of voluntary versus mandate, that seems to follow in line with my previous point that essentially this process in our view is a consensual one. For mediation to be as effective as we know it can be there needs to be a will for the parties to make it work, which really makes the whole question of being mandated a tough one. Because it requires co-operation and the parties themselves working towards their own solution, it makes it difficult to mandate it.

But having said that, I think there are ways of giving them a nudge from time to time because, while we are relying totally at this stage on voluntary participation, we are not seeing as many parties come to the mediation process as I think we should and can with perhaps some encouragement along the way from some other mechanism. I have some thoughts on those that I will be happy to pass along to you. The degree to which they are encouraged and forced to mediation I think has to be taken with care, because there is a downside to it, in that the more they are obliged to participate, the greater the risk that meaningful participation will deteriorate and that therefore the results will also deteriorate.

The private sector versus the public sector role: I have just a brief comment on that. Essentially it is pretty clear to us that the provincial government and the public sector have a regulatory responsibility, but on the other hand, I believe that there is plenty to be said in terms of the private sector's providing a lot of the hands-on delivery of services, the kind of thing that I have just explained in terms of the role that our company has played.

In fact, certainly from my perspective as a businessman, creating a climate or an opportunity for private sector is one thing I would like to see more of, because I think that in turn is going to see responses from the private sector, as I think John Livey made comment to as well, putting it on a user-pay level involving the individual disputants in a greater responsibility for resolv-

ing their own dispute outside of the system that the public is already paying for. It seems to go hand in hand with leaving private sector as a delivery service of these programs.

The application beyond insurance is an area that we have some experience in, but it has been insurance as a predominant area. The system as it is designed, in my view, with very minor modifications, has application well beyond the insurance sector. By making a few minor changes in terms perhaps of who the mediators are, for example, the procedural steps could be followed in a wrongful dismissal suit, a construction case. I have brought some examples of other types of mediation that we have done to illustrate that it can be used in a very broad area of application.

In that sense it is very generic. I would also comment that in fact the mediator's role in this is somewhat generic as well, that the actual process of mediation is relatively generic and does not necessarily rely on a large degree of expertise within the field in which the parties are mediating.

I gave some thought before coming here today as to how one might proceed in terms of making these kinds of programs, or something like this, take place here in Ontario. We have had most of our success, the better results have come by way of a pilot project approach, and I would be happy to talk to you about some of those ideas. In fact I think we are in a position here in Ontario to give some serious thought to making some of these results available on a more broad plane by way of a pilot project and I guess getting some of your own firsthand results rather than relying necessarily on the information that you are getting from a lot of sources during these hearings. The actual pilot project design, setup and so on are areas where we also have a certain degree of expertise.

The bottom line through all of this is essentially, in my view, that there is indeed, I think, a very important role for mediation to play in the civil dispute area. I think a way of conceptualizing that is to consider to what extent we can achieve better results if momentarily the legal profession and their respective clients could just suspend some of that litigation activity and turn their collective energies towards a more positive kind of problem-solving situation.

It would not take a whole lot of initiative, I think, on behalf of the people who are out there within the system to have in fact a very sizeable impact on the degree of problems within that existing litigation system—at a very minimal cost

too, I might add. That is essentially the essence of what I came to describe.

The Chair: Thank you very much, Mr Gardiner. I believe Mr Smith has some questions for you.

Mr D. W. Smith: I guess I ask this question maybe somewhat out of frustration. As a member, you get constituents who come to your office and they bring you their troubles. I do not know why they come, quite frankly. It is usually divorce cases or custody. In this one particular case—I will have to give you a little background, I suppose, to figure it out. The wife is a widow. There were two marriages, so there are two children from the first marriage of her husband, who is now deceased, and one of her own. It seems to me that under the system we have now the natural mother can bring her back to the court just about any time she wants to. It costs her quite a bit of money, in my opinion—it could be \$1,000, it could be more—every time she goes to court.

I do not know whether mediation, in your opinion—is this the place where it would work or be better? I just cannot believe that if a judge says in one hearing: “Yes, she is taking good care of these children. The children don’t want to move back with the natural mother”—I think it should stop right there. How does this thing keep mushrooming, almost, back to the courtroom? I guess I cannot see the fairness. If the kids wanted to go with the natural mother, yes, I would say that then maybe things are not settled. But they have not changed their opinion yet the lawyers can keep bringing these two people together.

It gets a little upsetting, I would think, for the mother who happens to be left looking after the children. I do not know whether mediation would work better in that case. I do not know, because I am not a lawyer. I tell you that right now. I am not a lawyer. But we do have a number of people who come to our office, and this is just one particular case that I happen to be aware of. I bring it up to see if you can expand on it to fill me in as to how the courts can even allow that to happen and whether ADR would be better.

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Ms Fair: If I could comment on that, family law, of course, is a very different kettle of fish. Our company is not really involved in that kind of dispute. However, from my past experience I do know that the type of thing that you are describing happens often.

One of the reasons I believe it happens is that the parties who are going through emotional crisis when they are involved with that kind of

scenario that you have described have not been given an opportunity to voice what their true feelings are and all of this kind of emotional thing. There are family mediators in the city and in the province who are very, very skilled at dealing with this kind of dispute.

I believe truly that that kind of dispute can be handled by a family mediator very well, much better than the court system, where the parties are taken in with two lawyers who have not a great deal of interest really in the outcome of the case and a judge rules on the positions presented by both of the lawyers.

The parties never have an opportunity to voice any of their real concerns in that scenario, whereas in a mediation they would have an opportunity in a structured setting, with or without lawyers; some of the mediators work without lawyers in the room. Therefore, when they arrive at some kind of settlement, it will be a settlement to which they have contributed and perhaps there will be more of a chance that it will stand up for a longer time period.

Mr D. W. Smith: You used the word during the presentation to “nudge” the system. Is this an area right here that you believe we could fairly—I do not know whether I should use the term “legislate,” but I guess we will have to use that term—nudge the system into more mediation cases in that area than what is happening there now?

Ms Fair: I certainly do. I know that in the provincial court mediation services are available at all times. I also know that they are not being used really. It is not something that the lawyers are used to doing as yet, so only when certain of the judges suggest it to you, if you are before them, do you even look at that facility. So I agree that it should be legislated, yes, and would be very, very helpful.

Mrs Fawcett: Thank you for your presentation. I was rather interested in the pilot project that you were speaking about and I would like you to enlarge there. I am just wondering what areas you would include in that. Then would you concentrate just in major centres or all over, like outside?

Mr Gardiner: In fact, it is difficult to have a game plan coming in here, but I can give you a couple of examples. In terms of a pilot project, what I would suggest is that we need to spend some time trying to find what the best area is. It could be, for example, existing litigation that is perhaps just prior to a pre-trial conference. I expect through various government agencies or the courts we could ascertain how many cases are

coming up for pre-trial within the next six months and perhaps select a number of them, 50, 100, 200, and divert them into mediation on a voluntary basis, but with the support of the Attorney General or other ministries that would be responsible for this.

I would expect that we could encourage a good number of those individuals to divert their efforts: "Let's take this case and try a mediation conference as compared to a pre-trial." It does not eliminate the opportunity, but by doing so, we could then ascertain for ourselves if the program that we are using on insurance cases does indeed work for a wrongful dismissal perhaps or a construction loss and so on.

In terms of its geographic application, again it is at the option of the owners of the pilot project: "Where would we want to do this? Toronto or elsewhere?" In terms of setting up pilot projects for other organizations, we spend some time up front with them, talking to them about: "Where are your specific needs? What areas would you like to start at? Let's look for a place where we are going to enjoy some successes and let's put in place the parameters of this project to ensure that we get the best possible result. Let's take the care in planning it to ensure that that occurs." Then we start it and run it, and indeed, if it is done well, we do get the results. So we could design a pilot project in conjunction with the needs of the specific area.

If we wanted to start in family, for example, that would be a slightly different approach than in the general civil litigation area. It needs to be carefully planned to deal with such issues as cost: Who is going to pay for the mediation process? In the current program that we are using, the users pay. It is a commercial situation and in fact, in my view, that is one very good starting point right now, where the disputants have the wherewithal to fund their own mediation process. We are currently selling it to organizations based on the fact that it is going to save them money, and it does indeed save them lots of money. So I think we would have a good opportunity to put something like that in place very quickly within the commercial kind of dispute area.

The family is another area that I think is begging for this kind of thing, but it is a little bit more complicated because you do run into additional issues, such as the money to put it together, and the issues tend to be somewhat more deep-rooted and more complex and require a little bit more care.

Mrs Fawcett: If money was not an object, would you think that would be maybe one of the better places to start?

Mr Gardiner: Absolutely; yes.

Ms Fair: I believe our position really is that there is a certain part of family that requires one type of mediation, not always a four-hour or a two-hour mediation, and that would be the type you were referring to: custody, access, things that are not perhaps money-related with the exception of support.

There is another part of family, such as the division of assets in a divorce, that really means going through your financials and dividing things up accordingly, which is usually in the Supreme Court of Ontario. That would be more of a commercial type of dispute, along with the other things that are in the Supreme or district courts, which would fit into a scheme such as the one that we use with CDRC, the four-hour mediation, the eight-hour mediation. Generally, a set time is not required. It goes on and on.

Mr Kormos: Away from that theme, I guess more than a little bit, I am wondering if you could talk about creating relationships, rather than mutually exclusive objects, that lend themselves to an avoidance of dispute. I guess one of the areas I would think of would be in terms of worker-management relations in an industrial model. I think of social democratic countries that have well-developed senses of worker democracy, industrial democracy, wherein workers are on boards of directors and where there is a marked reduction in the antipathy that exists or that has existed between the two factions and where there is far less strife.

I am wondering if you can talk about the need not just to look at alternative dispute models, but the need to look at alternatives to our traditional relationship models so we can start looking at ways of inherently avoiding conflict or dispute?

Mr Gardiner: I guess the way I see that whole scenario is that that is going to take time. I believe there is already a move towards less adversarial thinking, both in the schoolroom and in terms of our next generation, but my concern is that in the meantime we have a problem in front of us and a task to perform. It is a question of dealing with the situation as it exists today.

What we are finding, and I think this is going to help contribute to a change of attitudes and to a less adversarial way of thinking, is that when parties start to experience what they can accomplish by taking slightly less adversarial attitudes towards one another in a mediation forum and realize that when they turn their minds to a more

co-operative style of negotiation and a more open style of negotiation, perhaps the next time they deal with one another they will not be quite as adversarial.

We are seeing some evidence of that, as you mentioned, within the labour-management field; not as much as I think we need to see. The application of these tools and these processes in a more formalized, structured mediation forum I think is going to encourage that kind of change of attitude. In due course perhaps there will be less need for a structured organization such as ours, and perhaps in 2010 we will be out of business. In the meantime there is more than enough work to be done in terms of dealing with the existing issues as they are today.

Mr Matrundola: Mr Gardiner and Ms Fair, I appreciate your presentation. I see that you have a variety of knowledge in different fields of mediation. I also see that some of the cases are rather small. Do you go by time or by case? I am interested in knowing this because many times we also get inquiries from constituents, what they should do, what they should not do and so forth, and naturally the best thing is to go and see your lawyer. That is the normal thing, but sometimes perhaps there are occasions where firms offering services like yours might be useful.

It is also important for us to have an idea of the fee schedule. I do not especially want to ask you to tell us what your fee schedule is, but I believe it might be useful to know that. I see a case here that is about \$7,000, five hours and so forth. The five hours, I take it, was the time it took to make the settlement once you brought the parties to the table, but there is preparation work.

Mr Gardiner: That is right.

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Mr Matrundola: I wondered whether sometimes it is one or two hours or something like that; for larger cases, \$50,000 to \$60,000, \$100,000, \$200,000 and so forth. In your account here, are you accounting for the total time taken or for the time taken at the bargaining table?

Mr Gardiner: Our company is a private company and it is based on commercial success, obviously. We charge a flat fee for a specific mediation. We have a fee structure based on the size and scope of the file, of the case. To give you an example, and I do not mind sharing this information with you, a typical four-hour mediation conference cost the parties \$750 each in total. That includes mediation time and that includes the mediator. There could be some

disbursements on top of that, if we do it at an outside venue, for hotel expenses.

Mr Matrundola: That is about four hours?

Mr Gardiner: That is for one four-hour session.

Mr Matrundola: So it is \$1,500 or more in total.

Mr Gardiner: That is right. That dictates the size of case that would lend itself to this kind of a program. If they are disputing over \$150, then it is not going to be of interest to us. I would suggest that they call a neighbour to sit down with them.

I have tried to illustrate in the material small cases, large cases and so on, to give you a sense. There was one case in there, as you noticed, for a \$7,000 settlement. However, the parties had already managed to find themselves in very lengthy litigation and they had spent much more than that between the two of them in the actual management of the litigation problem. So in terms of that mediation, it is not only the size of the case, but I guess the degree of entrenchment the parties have found themselves in. There have been wars fought over smaller sums, if you know what I mean. On average there is \$10,000 and up at stake.

Mr Matrundola: When you take a case and allot a certain amount of time, you have a broad look at the case and you figure out the case is going to take approximately two hours, three hours, four hours" and you budget the time at the table, plus negotiations. So that is the way you will assess your fee for that?

Mr Gardiner: That is right.

The Chair: I have a couple of questions. Mr Gardiner, you have pretty extensive background in this area and you have indicated that you have been involved in one way or another in the ADR issue with the Canadian Bar Association, provincial governments, business organizations and mediation groups. We as a committee have seen the ADR phenomenon in a number of ways, wearing a number of faces in different jurisdictions. We have heard witnesses talk about private courts, the insurance mediation process that you are involved in, a private commercial operation. We have heard about its application in family law mediation and in corrections. We have seen the Macaulay report on agencies, boards and commissions, which is an Ontario report, in effect recommending ADR be annexed to that whole administrative process.

What we are struggling with as a committee is to try to come to grips with a provincial policy or

policy themes to deal with this whole issue that seems to be popping up everywhere like mushrooms. We would like your guidance in terms of how you think a provincial government such as Ontario's should deal with this whole area from a policy perspective. You mentioned a regulatory role and you mentioned pilot projects, but is there any general policy direction or thrust that the provincial government should take, in your opinion, in this whole area?

Mr Gardiner: That is a pretty difficult question. I would like to raise these comments, back to you on that point. I have thought a lot about it and I have worked with some fairly large organizations such as insurance companies, for example. It is a similar kind of question perhaps on a slightly smaller scale. I am coming more and more to the conclusion that an agreement in principle or philosophy that yes, this is a good thing, and yes, it's worth pursuing, is the first step. Second, before being more definitive than that, my view is, let's get some practical experience and let's get some results, but let's find out where it works and how it works and then start to be more specific as to what the policy ought to be in a more definitive way.

I am hesitant to go much beyond that and say that we should be very clear and insightful as to what can be said about this field at this point, because quite frankly I do not think we have proceeded far enough. There are some examples of policy statements out there, for example, about the use of ADR. Companies are going on record as saying, "We support the concept and our organization will turn first to mediation as a tool of resolving disputes with any of our customers or clients before resorting to litigation."

Those kinds of things are around and I think that kind of approach is something that makes sense, but in terms of the broader picture that you are obviously facing here, it is very difficult to be really clear as to exactly where the government

stands on all those positions without having some more firsthand experience.

The Chair: Several of our expert witnesses have indicated that they thought the best place to start would be in government policy—how the government does its own business—with such suggestions as requiring ADR clauses or arbitration clauses in contracts the government makes with third parties, requiring its transfer agencies such as school boards and municipalities to have policies dealing with ADR.

I just wonder whether or not it might be an appropriate policy for the government of Ontario to take your pilot project concept and internalize it in the sense that there might be a unit in government that would look at all ministries and try to design ADR techniques and programs for the individual ministries and basically between ministries, because there is a lot of dispute that takes place in government between ministries. Do you think that might be a fair extension of your pilot project concept?

Mr Gardiner: I had not thought of it in quite that way, but running an intergovernmental mediation program makes a lot of sense to me, not unlike perhaps the system we have designed here where the various departments could turn to that source as a tool to get the job done. Certainly litigation within the governmental system is one clear starting point to take a leading step towards trying to resolve these disputes outside that system. Having taxpayers' money used on both sides of the equation does not make a lot of sense to me.

The Chair: If there are no further questions, on behalf of the members of the committee I certainly want to thank you both for coming and making your presentation and leaving the material. It will be very helpful to us in our final report. There is no further business for the committee today, so it is adjourned until 10 am tomorrow morning.

The committee adjourned at 1608.

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Legislative Assembly of Ontario

Standing Committee on Administration of Justice
Alternative Dispute Resolution



Second Session, 34th Parliament
Wednesday 21 February 1990

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Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday 21 February 1990

The committee met at 1010 in room 151.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: Good morning. The standing committee on administration of justice is in the seventh day on an inquiry into the issue of alternative dispute resolution in Ontario. Today our witnesses will be dealing with the area of family law.

CANADIAN BAR ASSOCIATION— ONTARIO

The Chair: Our first witness today is Jennifer Treloar, a partner in the law firm of Keller and Treloar. She is a member of the executive committee of the family law section of the Canadian Bar Association. Ms Treloar, go ahead and proceed.

Ms Treloar: I am here today from the Canadian Bar Association, which is a voluntary association of lawyers. I am on the executive of the family law section, which is a position elected by those people who are particularly interested in family law. As a group, we have been very active and interested in court reform, in policy as well as education of the public and lawyers.

Alternative dispute resolution has been an integral part of the practice of family law for some time now. Although separating spouses often find themselves in a litigious adversarial system, within that system there are a number of alternative dispute resolution mechanisms. Because of this and because of the general orientation of the family law bar, which is in my experience very settlement-oriented, it is the rare family law case that cannot be settled and that actually proceeds to trial. Our business is dispute resolution and we use both the court system and other dispute resolution mechanisms in that attempt.

In Toronto, the Supreme Court—I think it was approximately 15 years ago—set up a family law division. Family law cases are there dealt with separately from the other civil litigation matters. They are dealt with within the framework of that division, which is a very specialized division. Within that process itself are a number of mechanisms of ADR.

The first I want to speak to you about is the pre-trial. In each family law court action in the Supreme Court family law division, a pre-trial must be held before it can proceed to trial. In Toronto, pre-trial conferences are held before commissioners who are appointed and who deal only with family law matters; they have a great deal of expertise in that area. The parties must file detailed pre-trial conference material in which the issues are clearly defined for the commissioner, the parties' positions are set out and details of the parties' financial situations and their net family property are contained.

At the pre-trial conference, the commissioner will usually meet initially with the two lawyers, will get a sense from the lawyers as to what the issues that are dividing the parties are and why a settlement has not been achieved up until then. The commissioner will very often give his or her views on the probable outcome at trial of the case and will suggest and encourage ways that the action could be settled in a reasonable way. The lawyers are then sent out to confer with their clients and the process of negotiations starts up fairly seriously at that point.

If the commissioner perceives that one party or one party's lawyer is being particularly intransigent or unreasonable, he or she may often speak individually alone with the client to encourage a change in position. This process can go on quite a long time with the parties going in and out of the commissioner's office, sometimes almost on a point-by-point basis, with the commissioner acting as a facilitator in hammering out a solution. In practice, this has been very successful in arriving at settlements of cases.

In my opinion, the success of the pre-trial in Toronto is largely attributable to the dedication, perseverance and persuasive abilities of the commissioners. Commissioner Gertie Spiegel has been known to sit into the evening, and sometimes even into the night, in order to keep the momentum of settlement discussions alive.

Unfortunately, we have lost Commissioner Timms to private practice and the already long waiting list for pre-trial dates has become even longer. Certainly something that I think we all find very frustrating now is the length of time that we have to wait in order to get a date.

As practitioners, we often see the intervention of a persuasive commissioner to be the only way to convince either our own client of the unreasonableness or unrealistic nature of his or her position or to deal with an unreasonable competing side.

The pre-trial mechanism is not restricted only to Toronto. They are held in other jurisdictions as well. In my experience—and, as I practice in Mississauga, I have had a fair amount of experience in the Brampton courts with respect to this—the pre-trial mechanism is not as sophisticated or as useful in those jurisdictions.

The pre-trial outside Toronto is usually presided over by judges. These judges may or may not have any particular interest or expertise in the family law area, and the pressures of other work generally mean that they do not devote as much time or energy and they are not as interventionist in trying to get a settlement. Often in those jurisdictions the clients do not even attend and the persuasive ability of a third party is lost.

In Toronto, in the Supreme Court family law division, there is another mechanism, which is called a case conference. These case conferences are restricted to applications to vary a previous divorce decree. Before that action can proceed past the initial document exchange stage, we must attend before a case conference. Again, it is held before a commissioner and it is very similar in nature to pre-trial. If the action can be settled at that point, it is really most cost-effective to the client because it is held before cross-examinations are held, which are a fairly expensive procedure.

The next area of ADR that I would like to mention is mediation. Carole Curtis will be speaking to you more about mediation from a lawyer's point of view, and I understand that Professor Howard Irving will be speaking to you this afternoon, so I will make my remarks with respect to mediation fairly brief.

Mediation is a service that we have begun to use fairly extensively in family law, in cases where we feel that it can be useful. Both the Children's Law Reform Act and the Family Law Act contain provisions that permit the court to order and appoint a mediator who is selected by the parties. Before entering into mediation, the parties must agree that the mediation be either open or closed.

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Closed mediation is when anything that is said within the process of mediation is confidential and is not admissible in court without the consent of the parties. At the end of the mediation the

report that is filed by the mediator will set out only either that a settlement has been achieved and the details of the settlement or that no settlement was achieved.

If there is open mediation, the mediator can file a report that contains anything that he or she considers relevant. I generally, as a practitioner, will choose to have closed mediation. It is my opinion, and I do know if it is shared by a lot of family lawyers, that mediation is not to be used as a tool in the litigation process for evidence at trial but is really to achieve a settlement. It is much more likely that a settlement that the parties are truly happy with will be achieved if they feel free to say anything they want within the context of that mediation.

It has been my experience that mediation can be extremely successful in the area of dispute over access. I have also found that it is reasonably successful in the area of custody, but less so than in access. These issues, to my mind, because they are focused on the child's best interests and involve mental health issues, are amenable to a nonlegalistic litigious approach. It has also been my opinion that areas of child support and spousal support and property division are less amenable to mediation because they are much more legalistic in nature. That is a view that I believe is not shared by mediators, but from a lawyer's point of view I believe that, especially with property division being a very legal issue, there needs to be a lot of input by someone who has legal expertise and knowledge.

Another mechanism of ADR that we use, and that I believe can be a mechanism of ADR, is assessments. The court has the power to appoint an assessor to investigate and to report on the needs of a child and the ability and willingness of the parties to meet those needs. Assessments are used very often in disputes with respect to custody and access. Many people doing assessments are also trained mediators and they will also attempt to mediate the dispute before entering into the assessment. Only if they are not successful in the mediation do they proceed to conduct the assessment.

Even though the assessment is being prepared for trial and is a tool for litigation, it can have the effect of promoting settlement. I believe that it has that effect for two reasons. First, the individuals and lawyers will take very seriously the opinion of a well-respected assessor. This may result in a change of one party's position if the assessor disagrees with him or her. Also, the very process of the assessment concentrates the attention on the child and on the child's needs and

away from the emotions and the wishes of the parents. That very often has an effect of shifting some position as well.

The official guardian also, to my mind, plays a role in alternative dispute resolution. They have two roles that they can play in family law proceedings. The court can appoint a lawyer to represent the child in the legal proceedings and to make representations concerning the child's, or children's, wishes. In Toronto the official guardian's staff lawyers fulfil that function. Outside Toronto the official guardian has assembled panels of lawyers from whom they appoint in each individual case.

A lawyer appointed to represent the children should, and usually does, meet with all parties. They attempt to make the parties more child-focused. Again, once that procedure starts and the parties start actually considering and articulating the needs and wishes of the children, then often their positions soften and there can be some movement towards the middle and some settlement.

The other function that is performed by the official guardian is the preparation of a report for the court if it is ordered. In that case, the official guardian's report is usually prepared by a social worker after an investigation. It can have the same effect as an assessment in having a persuasive effect on the parties and making the child's needs and wishes clear to them.

As a whole, the family law bar, in my experience, is extremely settlement-oriented. The general thrust of the philosophy of family law is to find an inexpensive, quick and fair resolution to the matters in issue as is possible for our clients. Our negotiating skills and sensitivity to the emotions and needs of the parties are as important as our trial skills. There can be a perception that a case that goes to trial is in fact a case in which we have failed in some way, in that we have failed to achieve a settlement. This philosophy works hand in hand with the ADR mechanisms that I mentioned to you that we use in our attempt to reach a settlement. There will, however, always be cases that we cannot settle, either because the law in a particular area is unclear and we need a judicial pronouncement with respect to a certain point or issue or the emotional makeup of the parties or the issues means that they must have their day in court and it must be decided by a third party, being the judge.

ADR, in my opinion, cannot replace the court system, but it is certainly an extensively used tool. Side by side with the court system has been

an attempt to set up private arbitrations in family law. A number of years ago some senior family law practitioners set up an arbitration service to provide arbitration as an alternative. This service, as I understand, has not been particularly successful as yet. Some private arbitrations are occurring but it has not been extensive. Certainly one of the people who set up the system felt that it was a lack of publicity and a lack of knowledge on the part of the family law bar. I am not sure that is entirely the case. I think that there may be some element of that involved. We are not familiar with the procedures and we generally choose to go with what we know, but I think also the rights of appeal, the knowledge of the judges and the knowledge that there is a certain fairness built into the court system that we know how to deal with have been the major reason that arbitration has not been a successful alternative to the court system.

Thank you. Those are some of the areas in which I think we have been using ADR over the last number of years.

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Ms Curtis: I want to talk about mediation and I want to talk about it in the context of dispute resolution. I am a family law lawyer in Toronto. I practise exclusively family law and I have been in practice for 12 years.

I might add that there is no written material for you, and there is a reason for that. The bar association does not have a specific position on mediation; the family law section does not have a specific position. The reason is probably that there is no need for a specific position on mediation. It has been part of our practices for a long time. If there was a need for a position, it would have been 10 years ago when it was first introduced.

As Jennifer said in her initial comments, lawyers are in the business of dispute resolution, and I find the expression "alternative dispute resolution" kind of a silly title, because I always sort of think, alternative to what? Presumably it is meant to be alternative to courts, but family law lawyers particularly are already using and benefiting from many dispute resolution techniques.

Mediators have a tendency, I think, to think that they invented alternative dispute resolution or negotiated settlements, but lawyers have been negotiating settlements on behalf of their clients and resolving cases prior to trial for many, many years, before mental health professionals entered this field.

I make these as introductory comments because I want to put mediation in a context, and that context is that it is probably in the best interest of separating spouses to negotiate a resolution to their dispute, that mediation is one way of negotiating that resolution and that lawyer-negotiated settlements happen every day.

Those lawyer-negotiated settlements, like mediation, are also agreements between parties; they also avoid litigation or terminate litigation; they are also based on your client's instructions; and they are also binding in the same way agreement resulting from mediation would be binding. I want you to look at mediation or think of mediation as one method of settlement and to also consider the extent to which lawyers settle cases on behalf of their clients.

When you are looking at a settlement, if the deal that is reached between the parties is an improvident deal for one of the parties, it is going to end up in court at some point in the future, no matter who settled the case, whether it is a mediated settlement or a lawyer-negotiated settlement. The issue to be concerned about is the quality of the deal that is reached, the fairness, and that should be the measuring stick of the success of the settlement, not the fact of the settlement itself.

Jennifer's comments also indicated that there is enormous pressure on family law lawyers to settle cases. There is a pressure on us which, I must say, mounts with every year I have been in practice. There is pressure from our clients, from our colleagues, from judges, from the legal system, from mental health professions. That pressure to settle is not inappropriate, but to think that every case can be settled is a naïve assessment of the dynamics that happen when a marriage breaks up.

Most family law lawyers will tell you willingly that they settle more than 95 per cent of their cases. Many of us in fact did no trials in 1989 or did one trial in 1989, or two trials. I point that out because I think it is important to recognize the changing face of family law disputes in our legal system. It is quite astonishing to suggest to you that actually less than five per cent of cases would be resolved by a trial. I am not suggesting that only five per cent of cases go to court, but there are many proceedings that happen prior to trial, long before trial, that contribute to the resolution of disputes. Jennifer has itemized half a dozen of them.

The value of reaching a negotiated settlement is not disputed by anyone, whether that settlement results from mediators or from a lawyer's

negotiations. We all hope the value is that the parties feel that they have some control over their lives, their future and their children because they participated in the decision-making rather than had it imposed on them by a judicial person.

But it is worth remembering that there are no empirical data to suggest that mediated settlements are somehow longer-lasting than solicitor-negotiated settlements. It is worth remembering that both those settlements are negotiated settlements. The difference is that the parties have the responsibility for being their own advocates in the mediation process and it generally requires a face-to-face negotiation between the parties in the mediation process.

There are empirical data available—unfortunately, they are mostly American, and predominantly from California, which must have the most studied population in the western world—to suggest that negotiated settlements are more likely to be adhered to by the parties than court-ordered results, but those data do not distinguish between mediated settlements on the one hand and lawyer-negotiated settlements on the other hand.

Again, it is just worth remembering that lawyers were negotiating these settlements for years before mediators came along. Mediation is a relatively new phenomenon to the legal system and to civil cases, but not to family law. Mediation has been part of family law in Ontario for almost 10 years, to such an extent that it is no longer really an issue with the bar about whether or not the bar is interested in mediation or willing to co-operate or willing to use mediators.

I want to talk a little bit about what some lawyers perceived to be the biases of mediators or the biases of mediation as a process.

The people who do family law mediation are predominantly mental health professionals, although lawyers have started entering this field as well, and there are some ramifications from that. When I say mental health professionals, I mean psychiatrists, psychologists and social workers.

Many mediators will say confidently that they can mediate any family to reach an agreement, they can help any family to reach an agreement, which is actually quite a shocking statement. Can you imagine me saying to you, "I can settle any case, that's how good a lawyer I am"? I want to suggest to you that that is not an entirely realistic approach on the part of mediators.

Also, I want to suggest to you that the clients who mediators currently see in their practice have an impact on their vision of the process. Mediators right now are only seeing those

families that are most suited to the mediation process, sort of a self-selection, if you like. In other words, families that are totally unsuitable to mediation are not being referred to those people, so their client pool or their client base is very different from my client base, or Jennifer's, or any other family law lawyer's. In our view, this really affects the perspective that mediators have on the applicability of the process.

Many families are, frankly, totally unsuitable to mediation—many families in my practice, in any event, and in other lawyers' practices. They would not benefit, could not benefit, from that process.

Does that mean that case has to go to trial? Not always. It probably means that the lawyers will negotiate a settlement or will resolve as many issues as they possibly can and leave the courts to decide the one or two things that cannot be settled.

I also want to deal briefly with the cost of mediation. The range for paying for a mediator is somewhere from about \$80 to \$90 an hour to \$200 an hour or more. Right away that puts mediation for family law cases out of the reach of many families. I am going to talk about legal aid as well, but I am going to talk about it separately. Let's talk about people who are not eligible for legal aid, like the middle-class.

Using a mediator to settle your family law case does not mean you do not need lawyers. If you are using a mediator, you probably each need a lawyer to give you independent legal advice and also to reduce any agreement you reach to writing. So really, parties to a mediation are paying for three professionals rather than two.

Is it a cheaper process? Well, cheaper than what? It might be cheaper than three years of litigation and a five-day trial—it is certainly cheaper than three years of litigation and five-day trial—but is it cheaper than a lawyer-negotiated settlement? Not necessarily, and it is impossible to predict that. It could in fact be more costly because three professionals are involved.

Along the lines of the cost of mediation, I also want to deal with issues surrounding legal aid and mediation. Mediation is available to clients who are assisted by the Ontario legal aid plan, but it is available in a very limited range of cases and circumstances. The way the plan operates is that without specific advance authorization, a family can have available to it up to five hours of mediation that the plan will pay for one half of, if only one client is legally aided. They pay for that service at set rates, different rates for a psychiatrist, a psychologist, a social worker or a lawyer.

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In reality, it is difficult to find mediators who are prepared to do mediation at the legal aid rates. The legal aid rates are vastly reduced from the rates that mediators and lawyers make with their private clients. This is particularly a problem in Toronto, but it may be an even greater problem in smaller centres. The list of mediators in Toronto who will accept legal aid referrals is a diminishing list. What this means is that there are real questions about access to this service and questions about the quality of the service being provided.

There is right now almost no public funding or very little public funding of mediation. As a result of that, mediation becomes an option that is just not equally available to all members of the public. That is an issue that seriously needs to be addressed, and I hope it will be considered by this committee.

I also want to talk about some of the underlying assumptions surrounding mediation and where those assumptions are helpful and appropriate and where they have some gaps. I do want to say that I am a lawyer who is interested in mediation and supports and encourages my clients in mediation and uses mediation a great deal in my practice. I probably have at least 10 families in mediation right now.

My basic premise, though, and the point that I want you to take away from us today, is that it is a tool that is useful in a limited number of circumstances and with an appropriate family. In that case, it can be wonderful. It should not be seen as something that is appropriate across the board or widespread or something that should be mandatory in family law cases.

Let's just talk about some of the assumptions. Mediators market themselves, for example, as neutral third parties, so the assumption is that the mediator is a neutral person. They say that that ensures fairness in the process.

I am going to suggest to you that is not entirely correct. Mediators in fact have a bias, and that bias is to reach an agreement. The fairness of the agreement that is reached is not necessarily the mediator's yardstick for measuring success, the fact of the agreement is frequently the measure of the success, and mediators sometimes measure their own level of achievement by the number of settlements they can accomplish.

Again, I have heard mediators boast: "I can settle any case. I can mediate any family. I've never failed to reach an agreement with a family." That is a very different sort of approach from lawyers, and I recognize that lawyers are

trained to sort of have a win-lose mentality, but I do not see my job, for example, as being exclusively to win or even necessarily to win. I see my job as to close my client's file and ensure that at the same time my client is treated as fairly as possible within the context of the existing framework.

Another assumption underlying mediation in family law cases is that parties come to the table with equal bargaining power. This is a very important issue in mediation as it applies to family law. If people come to the table with equal bargaining power, they can control their own fate and they can participate in shaping their future. That is a very good premise. I do not have any problem with that. But it requires that the people sitting at the table do have equal bargaining positions. It requires that each party is capable of being an advocate to the mediator for his or her own position. Lawyers do not attend family law mediation; it is just the two spouses and the mediator. It also requires each party to be capable of being his own negotiator; to be a negotiator for himself. So right away it is requiring a certain level of skills that not everybody has.

Mediators answer this concern about equal bargaining positions by saying that they empower the people in the process; that they can address the inequities and somehow raise the level of the weaker party to be equal to the other party.

It will not surprise you to hear me suggest that we still live in a culture where men and women are not equal in their relationships with each other, where women are frequently in relationships where they are dominated by their male partner, even professional women, even well-educated, accomplished women. This is just a fact of our social structure. All the wishing and goodwill in the world does not change that for right now.

An obvious example of that is a woman who has been assaulted by her partner. It is really too simple an assessment of mediation to suggest that only those families with a history of wife assault would be unsuitable for mediation. That should be obvious. An assaulted wife almost certainly could not sit at a table with her assaulting husband and bargain as an equal. Many such women are absolutely terrified of their partners and are not and could not be in the same room successfully.

The real issue about unequal bargaining powers, though, is not limited to assault, and I urge you to think of it in a broader context. I urge you to think of it in the context of the motivating factor behind the assaulting behaviour, the

purpose of assault. When a woman is assaulted by her partner, it is to ensure continuing control of the woman by the male partner by the use of fear or threats or intimidation. I mean, the foundation of assault is an exercise of power; it is a very effective control mechanism. Women who come out of relationships where they have been dominated or controlled by their partners do not come to that table as an equal bargainer.

I am going to suggest to you that it is naïve in the extreme for mediators to think they can somehow redress this power imbalance in one or two one-hour sessions. This is not a family that should be in mediation. It is also generally, I think, unrealistic to be able to expect that weaker spouse to be able to advocate for herself. She probably has a history of changing her behaviour to accommodate the wishes of her partner and that history will continue.

Just speaking about history and behaviour, another assumption underlying mediation is that the past history of the party is compared to the future promises, and more weight is frequently given to the future promises. Mediation frequently attempts to minimize the importance of past behaviour, and wife assault may be one of those areas, but it is not the only area. Mediation frequently attempts to look at the future promises that people make in the process. Unfortunately, this approach if it is rigidly adhered to, ignores the structure of people's relationships and the baggage that people bring with them to the mediation process.

There is also an assumption underlying mediation, from the perspective of some mediators, in any event, that all families are suitable to mediation. I am going to suggest to you that mediation for family law disputes requires certain character traits, if you like.

First of all, if you are mediating anything to do with children, that requires an ability to put your child's needs ahead of your own needs. That is a very difficult thing for separating families. When a marriage ends, the adults are in so much crisis and so much pain that it is very difficult for the adults to even recognize that somebody else has needs.

Mediation, I am going to suggest to you, requires a certain level of maturity. It also requires a willingness to settle the case and end the dispute.

I want to make an analogy to Elisabeth Kubler-Ross's five stages of death and dying. The end of a marriage contains sort of these same five stages. The five stages are denial, anger, bargaining, acceptance and reconstruction. The

reason I raise that for you in the context of mediation is that parties are almost never at the same stage at the same time, and that is just sort of common sense. The party who wants out has thought about it for a long time and is maybe already at stage 3 or 4 by the time he or she moves out of the house. The party who is left behind is probably at stage 1. You are not going to get a settlement between those people unless they are both closer to stage 3 or 4 or near the end, and frequently lawyers have to bring their clients along—the client who is left behind—until they reach that stage.

Really, what I am suggesting is that it requires settlement discussions to be held at an appropriate time so that people are at the right place to settle.

Mediation also makes some assumptions regarding parenting and children that may not be appropriate in all families. For example, it assumes that all parents are prepared to act in the best interests of their children and are capable of acting in the best interests of their children. It also assumes generally that all children should have maximum contact with each parent. That is a wonderful theory, but it is not always the case for separating families.

Mediation also generally has a bias in favour of joint custody. I say this based on my own experience and practice. Many mediators publicly state that their own bias in favour of joint custody, their own approach to mediation, is that we start with a presumption of joint custody and we go from there. That is an inappropriate approach in many families. I do not want to dwell on it unduly because I know you will have other people making submissions on it, but I wanted to raise it as an assumption.

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Joint custody requires an enormously high degree of co-operation between parents and an ability to put the children's needs first. The weaker spouse is often pressured into accepting some of these presumptions or assumptions about parenting for fear of being seen as somehow unco-operative or obstructionist. Also, mediators sometimes use unrelated family law issues as bargaining chips in the process of reaching a settlement. So, for example, a parent who did not want to agree to joint custody but wanted sole custody might trade away some support or property rights to obtain the goal that he or she wanted. I am suggesting to you that that is a wholly inappropriate way of dealing with the end of your marriage. It adversely affects the weaker party, and that still is usually the wife.

Finally, I think mediation makes an assumption that not only are all families mediatable but all issues are mediatable. I think Jennifer made some comments about this. Most solicitors are quite comfortable with mental health professionals doing custody or access mediation. That mediation seems particularly suited to the expertise and skills that mental health professionals bring.

The concern really relates to mediation for other, meatier, if you like, legal issues. In my view, mental health professionals ought not to be mediating property disputes, child support or spousal support, except in the most limited and unusual of circumstances. In cases where I have families who want to mediate all their problems, I try to hire a lawyer-mediator to do that, and there are an increasing number of lawyer-mediators. I might point out, though, that that means the family is paying for three lawyers, because the lawyer-mediator does not remove the necessity for independent legal advice on the part of each spouse. The lawyer-mediator is not to give legal advice. The lawyer-mediator is to function as a mediator and help reach an agreement. So again just the expense of that issue alone puts that beyond the reach of many families.

In conclusion, mediation is a part of our process and it is a welcome part, but it is really part of the process as a form of negotiated settlement, not an alternative but as part of negotiated settlements. It is suitable in certain limited cases and on certain issues. It must be an entirely voluntary process with no element of coercion whatsoever.

Thank you very much for making the Canadian Bar Association welcome.

The Chair: I think we have about five committee members who have questions to ask and we have about 20 minutes. So I will try to restrict each person to five to six minutes because I am sure we will have another one or two questions pop up.

Mr Kormos: The CBA is always welcome. The CBA has been one of the most thorough contributors to the committee process here at Queen's Park. The sad thing is that the Liberals have been so consistently reluctant to adopt recommendations of the CBA. You can start with the automobile insurance issue that they talked about a week and a half ago and go on back into court reform where the CBA asked for more time to respond to the issue and the Attorney General and his lackey said: "No. We don't need your advice. We're smarter than all of you."

Interjections.

Mr Kormos: These guys have a real problem with that sort of stuff. I think I have struck a nerve. My goodness. So be it, because sometimes they are awful nervy in how they abuse the incredible majority they have.

You talked interestingly about the role of lawyers. There was a whole lot of lawyer-bashing going on here in the last four weeks. Indeed, it is remarkable that you would say that lawyers are still going to be required, even in a process in family law where mediation is being opted for, because people still have to have their rights protected. People still have to have help in focusing on the issues, in clearing out the stuff that is merely going to muck up the works and in refining things so that they can be dealt with efficiently on the basis of getting down to brass tacks. I contrast that with what the insurance companies said, because they came here saying, "Oh, the system will work much better if we don't have lawyers mucking it up. We'd like to be able to sit down with our injured victims and deal with them directly"—a scary prospect.

Really what are we talking about here? Are we talking about something fundamentally different from an access to a trier of fact, access to a courtroom? Other than the fact that mediation would appear to require compromise on the part of the parties, if I were in a weak position vis-à-vis the law and/or the facts, let's say in a marital dispute, I would opt for mediation. Again I realize I am speaking from a scenario wherein I suspect most matrimonial scenarios are: where I don't particularly like my spouse at that point in time. If I were in a weak position on the basis of the law or facts, I would opt for mediation. If I were in a strong position, no way would I opt for mediation.

One of the problems, as you pointed out, is that women traditionally have not been in that strong position. You talk about legal aid and mediation; let's talk about legal aid and family law. I know that where I come from every year there are fewer and fewer family practitioners who will accept legal aid certificates. Sadly, the person who will accept the legal aid certificates is the young person right out of law school who has not developed specific family law expertise.

Ms Curtis: Not true. I do a lot of legal aid.

Mr Kormos: But I am saying, where I come from, the Niagara Peninsula, every year there are fewer and fewer lawyers who will accept legal aid certificates because family law involves just a tremendous amount of work that legal aid does not adequately compensate for. So be it. What

are we talking about here when we are talking about a system that really does not do that much better or that much worse than a properly run courtroom?

Are we talking about a need for more reform when it comes to, let's say, the Family Law Act? Are we talking about a system that requires more reform when it comes to making sure women have access to counsel and access to courts? Or are we really talking about a system that has been well integrated already into the status quo? There is an impression being spread around this committee that ADR is going to be the panacea; that it is the thing. I am thinking about it in terms of replicating a system that has perhaps become cumbersome, expensive and creates impressions of unfairness, at least to the losing party. So if we are talking about institutionalizing ADR, are we replicating a system that is already in existence?

Ms Treloar: I think what we would like to see and what we have been using is that it oils the system. It is a technique we can use, and do use, when appropriate, to make the case, the system and the litigation work more efficiently for our clients. I do not ever perceive it as being able to replace the system, because I believe that the safeguards that are built into the court system and the law have to be there. I think when you posit it, the fact that if you are in a weaker factual or legal position you would opt for mediation in itself is the best example of why mediation cannot replace the court system. It can be an oil and it can be used very efficiently as that, but I think that we have to, as we stand now, restrict it to a tool in the process.

Mr Kormos: Could I have more time, Mr Chairman, because I have one more short question?

The Chair: By whose standards will your question be short?

Mr Kormos: Listen, if the government agrees with it, it is short; if it does not agree with it, it will call it long.

Interjections.

Mr Kormos: These guys get really nervous. I love it.

When you talk about matrimonial disputes, once again, where I come from we are not talking about Donald and Ivana, we are talking about hard-working people for whom big chunks could be taken out of the equity in their home by virtue of the expense of legal costs. Similarly, one of the problems that big parts of the province have is that we do not have adequate resources in terms of, let's say, mental health resources—we do not

have counselling institutions in our community that are adequately staffed either through the health care system because of the underfunding of health care or through the other social networking and social support systems.

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When you talk about the role of lawyers and the role of mediators, never mind developing some complex alternative dispute resolution structure that is concreted, let's say, in legislation: Are we not really talking about ways of making dispute resolution, be it in a courtroom or be it via a mediator, more accessible for everybody in Ontario? Once again, we had people here talking about native issues yesterday because, as you well know, Ontario does not end at Finch Avenue in Downsview; we have got all of northern Ontario with remote communities.

We have got some people who are going to talk next and I suspect one of the things they might say is that services for battered women do not exist—

The Chair: Mr Kormos, has your question been asked yet?

Mr Kormos: No. Services for battered women which exist without adequacy in large centres are nonexistent throughout most of rural Ontario and northern Ontario, even southern Ontario. What do you say about that when you are talking about Toronto-focused institutions that cannot be or will not be spread, it appears by this government and made accessible to people across the province?

Ms Curtis: One of the nice things about being involved with the Canadian Bar Association and coming to the legislative committee is that we raise the problems and you solve them. The problem is—and clearly I said this and so did Jennifer—that mediation is expensive for some people and not widely available. I did talk about public funding and I did talk about legal aid and there needs to be more resources made available for mediation. I do not have the solution for that because I am not in government.

Mr Kormos: The solution is more resources made available.

Ms Curtis: That is one solution, but also I really want to urge all of you not to think of ADR as some great new invention that has come along that is going to save families. It has been here for years. The civil litigation bar just discovered mediation about two years ago and, like mediators, they think they invented it. They think it is wonderful and they think they can take all their cases out of court.

Well, that may be naïve too. I do not practise in that area so I do not want to comment on it. All I am saying is that we have a long history of success with this technique and this tool and it works very well in our system in a particular place. It needs more funding, for sure.

Mr Kormos: Thank you. Thank you, Mr Chairman, for the chance to ask that second question.

The Chair: You are welcome.

Mr D. W. Smith: Ms Curtis, you talk about the bias of mediators. I guess I have to believe myself that we all have our own biases. By the way, I do not have a legal background but people have come to me—and maybe I hear the messiest cases, I do not know—on divorce or custody of children.

You said that the court cases should not be that long. I have got one down there, and I am not even sure if it is finished yet. They have had their day in court, but it took five and a half years. I would have to say that in this case the man would be the dominant individual in the family, but as I have heard this story play out, the lawyers almost had a bias against this guy. I do not know whether they should have or not, but when you talk about biases, I am sure that we all have biases and I do not know whether a mediator has any more bias than lawyers do. I come from a particular area. I do not know whether there is a strong bar association down in Sarnia or not, but boy oh boy, they sure took it out on the one spouse, the way the story was told to us.

Really, are the courts any quicker than with mediation? I think maybe divorce and custody cases should not be heard in the court because they really are messy; at least the ones that come to me are terrible. I would not want my dirty laundry strewn all around the countryside, and that seems to be what has happened.

I do not know whether you can enlarge on that bias towards mediators or not.

Ms Curtis: That is a very controversial thing for you to say, frankly: that family law should be taken out of the judicial system. I am not certain that there is any data to suggest that that is an appropriate way of dealing with it. Family law cases right now largely are settled outside of a courtroom. As I said, more than 95 per cent of our cases do not go to trial. But to suggest that somehow separating families would not have the right to resort to the judicial system does not sit well.

It would not be appropriate for me to comment on the case that you raised, but let me tell you that every one of us has cases that have gone for five

years, three years, or whatever. Every one of us has cases where, as Mr Kormos said, a third or half of the house is just signed over to the lawyers eventually because that is the cost of the litigation. Those cases are in the minority and they are in a smaller and smaller part of our practice every year because of the pressures that are on all of us to settle, and money is one of them.

That case that you described might be a perfect example of a case that must be in the court system, that must go to trial, not just because there is a dominant-weaker issue, but if they have not been able to settle it in five years and they have probably been trying, it is probably a case that needs a judge to say, "This is the determination." Not every case is settleable. Fighting over kids is not as easy to settle as fighting over property.

To use another example, a case like the Montagu Black divorce case or the Ivana Trump divorce case with many millions of dollars at stake, I have no trouble whatsoever with that case going to trial. I think that is completely appropriate. Those people can afford to spend \$100,000 on legal fees to sort out who gets \$5 million, \$12 million, or whatever. If Lac Minerals is entitled to go to every level of court in the province and the country, why are the Blacks not entitled to? I do not have trouble with that.

Mr D. W. Smith: Did you say that in a third of the cases the lawyers just take the proceeds?

Ms Curtis: No. That is not what I said.

Mr D. W. Smith: That is what I wanted to clarify.

Ms Curtis: What I said is that Mr Kormos was correct to say that in some cases, if the fight goes on long enough, a portion of the equity in the house is going to go to the lawyers. I tell my clients that at the beginning. I say to them, "All you have is a house and a pension. If you and your spouse can't sort some of this out, you might as well just sign over a third of your house to the two lawyers." It is a very effective comment for people so that they understand the process and they understand how important it is that they be reasonable in their expectations in the negotiations. I am not all shy about making sure my clients know what it is going to cost them.

Mr D. W. Smith: I would like some of the lawyers who deal down in my area, I do not know—

Ms Curtis: I might also add that I would think it would be a very unusual separation where the

parties would be willing to go to their MPP about their divorce—very unusual.

Mr D. W. Smith: Well, I know lawyers do not like them coming.

Ms Curtis: Whether I like it or not is not the issue. My guess would be that 95 per cent or 99 per cent of my clients would not have gone to their MPP over their case.

Mr D. W. Smith: It may have been an extraordinary case, but under the little bit I have heard about family law, which is supposed to be half, it did not sound like that in this case; yet when I hear that the one spouse tried 20 or 30 lawyers to represent him and he could not get anybody, then I begin to wonder, "What is going on here?"

Ms Curtis: Did it ever occur to you that there might be some problem with this particular constituent?

Mr D. W. Smith: It certainly crossed my mind, but I do not think the court in this case was any better than mediation. When you mentioned that mediators are biased, and I think you mentioned that more than once in your presentation, I just wonder if mediators are any more biased than anyone else.

Ms Curtis: I did not suggest for a minute that lawyers do not bring biases to cases. We bring all kinds of biases to cases. We are trained to be adversaries, we are trained to negotiate; but these are not hearings about the litigation system. These are hearings about other methods of dispute resolution, and I feel that family law lawyers have a tremendous experience with dispute resolution. I wanted to share that experience with you. I have a lot of experience dealing with mediators, and what I gave you is my experience.

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Mr D. W. Smith: I get the feeling that you would not want to see us legislate family law disputes to ADR or anything like that. I get that feeling.

Ms Curtis: I would not want to, but you make it sound like we are not using methods of dispute resolution now, and that is not an accurate assessment of the existing system. Family law is using dispute resolution mechanisms more than any other area of law right now.

Mr D. W. Smith: Thank you.

Miss Nicholas: I have one question for Jennifer and one for Carole. You were mentioning about pre-trial conferences. I know that they have been a great help in the settlement process

within court, because people sort of make a mini-preparation for that trial, as they would have waited to do when they went to court. It allows them to address it and sort of get a feel for where their position is.

You made reference to the fact that the pre-trial success is deteriorating because of the length of time you have to wait for a pre-trial. I wonder if, within the court system, it would assist at all—there was a suggestion made that if we can speed up the pre-trial conference date that in fact more settlements would result much sooner and that the delay in that is compounding the problem.

Ms Treloar: I think the waiting time that we have for a date certainly does mean that our possibilities of settling a case at an earlier stage are diminished. I think we would all welcome earlier dates and more available dates. The only way that can be done is to appoint people to conduct those pre-trials. The character and the ability of the commissioner are particularly important. But, yes, we could certainly use more to conduct the pre-trials.

Miss Nicholas: If the pre-trial date was accelerated, though, do you think more people would opt for that process over the mediation process, or are they still two different groups of people?

Ms Treloar: They are two different groups of people and different circumstances. The pre-trial is traditionally now held after discoveries, and that is really for a purpose. The discovery stage is essential for everybody to know the facts and to get full disclosure so when they go to the pre-trial they are adequately prepared with sufficient knowledge to make an informed judgement and opinion as to the chances of success at trial and what the parties' rights really are.

As a lawyer, in taking your instructions from your client, your client may have an opinion with respect to the finances of the other side or an opinion with respect to certain facts which upon investigation turns out to be erroneous. It is not because they are not telling you the truth, but they have just made a mistake in certain areas. After the discovery stage we have had a much greater opportunity of ferreting that out. We can advise our clients and the commissioner much more fully as to the probable outcome at trial or what the facts really are.

The case conference being held at a pre-cross-examination stage is a little different, because it is only done in those cases in which they are looking to vary in a divorce judgement, which would be with respect to custody, access or

support. Generally the facts around that are only facts that have occurred since the divorce and are not as complex or as difficult to ferret out as they may be in the first instance and with respect to property issues.

Miss Nicholas: Carole, you are saying that the mediation process is already in place and that people are choosing that as an alternative to the court system.

Ms Treloar: Yes.

Miss Nicholas: As you know, our committee is trying to grapple with the idea of the government having a policy in all areas with respect to alternative dispute resolution, or dispute resolution other than the court system. I wonder how we can help in the family law area, or is it going along just fine without us? You seem to allude to the fact that it is going along fine, people choose that as an option when it is appropriate, and that there would not be many appropriate parties who are not using it now, many parties who we, by stating a policy, might be able to assist in the process. I am not sure—can you comment?

The Chair: If I can interrupt just for a minute in terms of process, this particular delegation was scheduled to complete at 11:15, when the next delegation was to commence. I just want to ask the next delegates if they would mind your particular presentation going another 15 or 20 minutes beyond the completion time. If you have no commitments for that particular time slot, then we will extend this one a little bit longer because we do have a number of questions for this delegation. So please answer the question. Sorry for the interruption.

Ms Curtis: That is okay. It is tempting to say, "If it ain't broke, don't fix it," but that is not a complete answer because mediation is not available across the board and across the province in an equal way to all separating spouses. Do we need a government policy that puts into place something formal that is attached to each court office? That is interesting and might be something to consider. Do we need publicly funded mediation offered to separating spouses on an ability to pay basis? That might be something to consider. Do we need a system whereby parties must attend mediation or must attend some kind of information session before they are permitted to start litigation? My view would be no on that question.

If the one thing that the Canadian Bar Association communicates today is that in family law the system that is in place is working and has

some benefits, then that is worth while. That certainly does not mean it cannot be improved. It can be improved, and I think access to mediation is the big issue and I think funding is the issue for that. I know there are recommendations surrounding setting up mediation models, and some of those recommendations are controversial among the bar, but certainly the issue of mediation itself is not as controversial as it might have been 10 years ago.

Miss Nicholas: I have just one more quick question. I was intrigued that you said, Carole, that you felt that you went to court last year maybe once or maybe twice.

Ms Curtis: To trial.

Miss Nicholas: To trial, and for most family lawyers that would be about the amount that they would go. I attribute, and I say this as a lawyer, the backlog in the system as a great percentage of that—I am not saying all of it—being due to the fact that lawyers find their dockets very full. They delay it and it takes another date and another date and this is contributing to the backlog, because lawyers' schedules are full and they themselves are perpetuating the delay.

Are you saying that they are part of it, part of it is the lack of judges, the lack of courts, but a lot of it is the lawyers as well, who are just prolonging it? I wonder if you are saying that this is not the case with both the pre-trial and the court date in the family law section because the lawyers are prepared and willing and it is more the lack of commissioners and the lack of judges or the lack of facilities that are prolonging or delaying the procedure through the court for a litigation process.

Ms Curtis: I just want to deal with two of the things that you said, because when I said that a lot of family law lawyers would tell you they only had one trial or no trials in 1989, that was not a comment on the backlog in the courts. That is a comment on the success of family law lawyers in settling their cases.

Miss Nicholas: I think I was talking about the delay in time for the pre-trial.

Ms Curtis: Without requiring a trial. The issue of backlog in the courts is a huge issue that cannot be resolved in 10 minutes at dispute resolution hearings. You will have a lot of trouble getting a lawyer to admit that lawyers contribute to the backlog in the courts. However, I am not naïve and I am going to suggest that certainly there must be some lawyers who do. But family law lawyers get enormous pressure

from their clients to put an end to this pain that they are going through.

I am part of the bad old days for my clients. They want me out of their lives as fast as possible. There is not a day that goes by in my practice that somebody does not call me, begging me to end the litigation or the settlement or whatever, in fact sometimes to his or her detriment. People are so anxious to finish it that they start trading away things that they should not.

I think family law is an area where it is rarely to your client's benefit to delay; it is frequently to your client's detriment to delay. The only time I can think of delay being appropriate is when my client is the one who was left behind and is at number one or two stage and the other client is ready to deal. I need to move my client forward.

Ms Treloar: If I could just add a little bit to that, there is a difficulty for family law lawyers with respect to the interim stage in the backlog. In taking an interim motion in order to decide issues of interim support, interim custody and interim exclusive possession of the home, we often find that there are not enough people to hear it, and on cases I have had to come back two or three times, often at month intervals between, in order to get heard, because the list was just too long that day and we were not able to be reached. So that is a problem for us.

Quite frankly, after the initial flurry of interim motions, once the initial positioning has been taken by the parties, the expense in legal fees—they begin to see that it is expensive. We find that settlement is much more possible as well. So if that can be resolved at an earlier stage, it is helpful.

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Mr Epp: I guess all of us are familiar with lots of cases that drag out and so forth and the ones that are higher profile. But I guess what I want to find out is what comes first, the chicken or the egg. There are certain lawyers who have a propensity for drawing out their cases. I want to know whether it is the cases that are going to be drawn out that end up on those lawyers' desks or whether it is the lawyers who drag out the cases.

We all know lawyers who tend to get high fees, very high fees, and do extremely well. I know of cases where I had a distinct feeling that they were dragging them out because their fees were going up. I know one woman who ended up paying \$43,000 over two years and a lawyer probably dealt with that about one full month during that two years and got a nice fee for it. She had it taxed and it was rolled back to \$39,000.

This is about eight years ago or 10 years ago. So what comes first, the chicken or the egg? Do those cases go to the lawyers or do the lawyers drag them out?

Ms Treloar: By and large, there will always be a couple of lawyers who do that, and I do not say that I have not run across them in my practice, lawyers who I believe have not been settlement-oriented. But interestingly, clients tend to seek out the personality of the lawyer they want. You often find it goes hand in hand: The client chooses the lawyer he wants or she wants to fight to the nth degree.

They will pay to do that and you have somebody who consistently rejects—if you have unreasonable clients, they consistently reject your intents to settle. They have a real need to have a knight with them and they will also seek out a lawyer who will do that for them. So the blame can be pointed two ways at the lawyers who do that—and I will not say that I think that there are not some. Certainly in family law they are the minority.

Ms Curtis: I would just like to add that people really do get invested in the fight, as in the example that Mr Smith gave. One of those parties may have been very invested in the fight and very unwilling to bring the matter to a conclusion. The sad thing is that frequently there is one of the spouses who has invested in the fight and there is some sort of innocent person on the other side who also will be spending \$40,000 in legal fees because his or her spouse is hard-headed, or interested in dragging it out or taking some pleasure in the upset or hurt that he or she is causing the other party.

You know, there is not an awful lot lawyers can do about that. I can choose not to be that person's lawyer. I can say, "I am not going to act for you and I am not going to fight this for five years," but I cannot control what other lawyers will do. That client will definitely find somebody. Jennifer is right. Clients find the lawyers they deserve, and frequently you will find a very rigid spouse who is unwilling to negotiate and retains exactly that kind of lawyer, and it is a deadly combination.

Mr Epp: They live on each other.

Ms Curtis: Yes.

Mr Epp: I have just one short question. Do you find that mediators would probably be best suited, or is there an indication that they probably end up in more cases where there are children involved in the settlement? Is that where they are probably best suited, particularly if they are

psychiatrists or psychologists or somebody of that nature who try to understand the—not that lawyers do not, but who probably have a better understanding of the implications of a long-drawn-out case or an adverse settlement on one of the parties?

Ms Curtis: I think that lawyers are more comfortable with mental health professional mediators dealing with custody and access issues. That is a lawyer's bias, you know; that is a bias we bring to the process.

The introduction of lawyers as mediators in the last two to three years has changed that to some extent and I am quite happy to be able to sort of refer my clients to a full-service package; to refer them to a lawyer-mediator who can settle the custody and access issues and can deal with the financial issues and help them with those issues in appropriate cases, you know, where the people have equal bargaining positions and they have the maturity to do so and the willingness to do so.

I think that when you hear from mediators, you will hear a different perspective, that they feel that the skill is in reaching a settlement and that their knowledge of the legal issues is not relevant—I should not say is not relevant—but is not as important and that they should be available to settle all issues. I think there is really a big difference between the way lawyers feel about that and the way mediators feel about it.

Mr Epp: I have one other short question, if I may, with your indulgence, Mr Chairman. That is, you indicated earlier that it was your job to bring the problems here and we are supposed to come up with the solutions. Maybe you could help us with the solutions. I know that Miss Nicholas touched on that, but are you really saying that the present system, given all its strengths and weaknesses, is working out relatively well and there is no area, except for pouring more money into this system, where we can improve on it? Or are there ways of making it more efficient yet sensitive to the parties without pouring money into it? Most problems in life you can always solve by putting money into them, most divorce cases too. But we do not have more money.

Ms Curtis: I do not have a magic answer to your question. It is a very difficult question. There are jurisdictions that have court-connected mediation facilities, and those jurisdictions report a very high level of dispute resolution. But we are telling you that Ontario has a high level of resolving family law disputes, a high percentage and a successful percentage even with the shortcomings in the present system.

I also am not suggesting that the present court system or court structure or litigation model is perfect or could not be improved; it really could. But we really focused our comments today on mediation and how it fits into that process and how it benefits it. I can tell you that in 12 years, every year more and more cases in my practice do not go to court and do not go to trial, every year more and more families resolve their disputes another way and every year mediation and lawyer-negotiated settlements become a bigger part of my day-to-day practice.

Mr Epp: I am encouraged by your comments. I really am.

Ms Treloar: If I can add just one thing, I think that our remarks have been very specific, and particularly with pre-trials and their success, to Toronto and, to a certain extent, the jurisdiction in which I practice, although I am also involved in the Toronto courts so I have the same experience. I am not so certain that that experience is shared by people in other jurisdictions. A lot of pre-trial judges certainly are judges who do not have an interest or an expertise in family law. I think that it might be useful if something could be addressed to jurisdictions other than Toronto.

Mr Villeneuve: The sad thing about marriage breakdown, family law reform, what have you, the mediation process works well, but when there are children involved, could you explain a bit the mechanics of the mediation process? In my other incarnation as a real estate appraiser, I was involved on a number of occasions as an expert witness and, when you get to there, you are attempting to destroy credibility, very much so. It is a devastating process. If they were not on speaking terms before getting to court, they sure are not going to be when that is done.

At the mediation process, the mechanics, does the mediator attempt to assess credibility or is he simply attempting to get to a conclusion, something that is palatable to both sides? Do you put the children before the mediator to get their side of the story? What happens?

Ms Curtis: Actually, you are probably better off asking a mediator that question. I can give you my assessment or my interpretation of what my clients tell me, but again I think this has to do with what assumptions the mediator brings to the process and what biases the mediator brings to the process. I made the point that I think many mediators operate on the basis that all parents are going to act in the best interests of their children, which is just a fantasy, in my experience. Not all

parents are capable of doing that at the separation date.

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Do the mediators assess credibility? I do not know how they can. I do not know that a mediator would consider that his or her job. His or her job is to reach an agreement on the wishes and instructions of the two parties and to assist the parties in reaching an agreement. Again, it sort of hearkens back to my comments about past behaviour and future promises being an issue for the mediator and that the mediator will focus on people's future promises as an effective way of resolving the dispute rather than assessing somehow past behaviour.

Also, the mediation process is frequently a very different stage in time than the trial. You know, with a trial it is years since the separation. Lots of people get into mediation quite quickly. People are very sophisticated about family law mediation. Probably 35 per cent of clients ask me about it before I mention it. So people are knowledgeable about family law generally; they are knowledgeable about the things available to assist them.

Also, more than that, maybe 65 per cent of clients say to me in the first meeting that they want to settle this, they do not want to go to court. That is very helpful for lawyers to hear. That is how I perceive my job to be, but that sort of goes back to Ms Treloar's point about the client who also tells you in the first meeting, "I want to drag this out for five years and I will do whatever I have to do." So I think you should ask the mediators that question.

Mr Villeneuve: So you cannot really help the committee here if a five-year-old child or an eight-year-old child would be asked to participate.

Ms Curtis: Oh, I can help you with that question. That is completely up to the mediator. I think it would be unusual that a five-year-old child would be part of the mediation process, but I do not think it would be that unusual for an eight-year-old child to be part of the process if, in fact, the child's input was needed. The child's input is not always needed, because if people are in mediation, there is a high level of co-operation already. So you hope that the parties can agree on some of the things, like what it is the child wants, and sometimes that might be where a mediator would interview a child. But you know, it is very stressful for a child to have to go through that. "Who is this complete stranger who my parents are going to see, and I have to go and talk to him or her? I am afraid, and I do not want to have to

choose between my parents." You know, it is a rotten place to put your kids.

Mr Villeneuve: I am glad to hear you say that. Thank you.

The Chair: I have a few wrapup questions for the witnesses. I will direct this question to either or both of you. How should the system deal with the clients or the lawyers who reject the settlement approach? I think, Ms Curtis, you referred to the deadly combination of someone who wants to litigate, who wants to fight, wants to perhaps put the other person down, and finds a lawyer who will do just that. How should the judicial system deal with that deadly combination?

Ms Treloar: It is very difficult to. There is one mechanism which is a cost sanction. One party may have to pay the other party's costs, and on a higher scale, perhaps, if he has acted in unreasonable and inappropriate ways. Unfortunately, that cost sanction usually does not turn out to be that strong a sanction. First, in a large proportion of settlements, both parties just say, "Okay, we pay our own legal fees and that is it." So the person who has really dragged it out does not, other than paying his or her own bills, which may be high, have that sanction, does not help out the other spouse when it was unnecessary for him or her to have to pay.

Particularly in child custody cases, judges often feel that they ought not to award costs against the losing party, someone who has lost custody of his children. They may feel he has suffered enough or nobody should be penalized for putting forth to the court what he feels is in the best interests of the children. Unfortunately, I think that is somewhat naïve. People often persist and can be seen to persist in custody litigation, which is very detrimental to the children, and clearly they ought not to do so, not just for the cost sanctions, and there was no chance of success. I think that there should be some sanction on them.

With respect to costs, perhaps they could be paid at interim stages, more costs payable forthwith, and one party is not entitled to proceed with his side of the litigation until he has paid up. If they pay along the way, it might help.

The Chair: This particular problem is the very area that I believe a number of our other expert witnesses have suggested might be a useful approach for court-annexed mediation. At a stage in the proceedings, whether it is a pre-trial or whatever, a judge would require some type of court-annexed ADR, and if the parties refused to co-operate in that process, then there could

conceivably be sanctions other than the cost sanction. I think, Ms Curtis, you referred to some jurisdictions that do have court-annexed ADR. Do you think in the case of this deadly combination that ADR might have some relevance?

Ms Curtis: I think it would be really inappropriate that a judge could order people to go to mediation. That is an oxymoron, ordering mediation.

The Chair: What about the court-annexed ADR that you said exists in other jurisdictions? How does that operate?

Ms Curtis: I would not want to tell you how it operates and be wrong, so I am going to suggest you might look to American jurisdictions and see it state by state. In some jurisdictions it is offered on a volunteer basis. In some jurisdictions you must attend one session of mediation before you are permitted to issue documents. I am not certain which state operates it that way.

There is not general agreement in the bar and among mediation experts about whether people should be obliged to attend a session. My submission to you today is that people should not be obliged to attend mediation. It is not appropriate. Would it help that intractable case? In my view, almost certainly not. That spouse has made a decision not to settle the case, and probably many people have already tried to settle that case, either several lawyers or friends, or they may have been to mediation. I have a family in a custody dispute that was with four different mediators in a year, four of the most well known mediators in Toronto, and did not settle the case. These were sophisticated, intelligent people who were suitable for mediation. So it might be suitable for a range of people, but it does not work for all those people.

The Chair: You referred to what you call lawyer-mediators, as opposed to other mediators. What is a lawyer-mediator?

Ms Curtis: The lawyer-mediators that I use in my practice are lawyers who have taken mediation training and who hold themselves out as mediators. They would perform the same function that a mental health mediator would perform. They would not be a lawyer or the lawyer for either of the spouses—each of the spouses would have to have his or her own lawyer to get independent legal advice. They would meet with the parties in the same way a mental health professional would meet with the parties to try to help them resolve the matter. It would not be appropriate for those lawyers to

draft the agreement, for example, that the parties reach, although those lawyers could prepare a written memorandum of the agreement, a letter or something. But the parties' lawyers would then, when an agreement was reached, resolve it in the usual way—prepare a separation agreement for exchange, negotiate the fine points—and the parties would sign it.

The Chair: I am addressing this question to both of you. Gordon Henderson, who is the past president of the Canadian Bar Association, was a witness before this particular committee. He suggested that the province consider a policy establishing a legislative framework for the whole area of arbitrators and mediators, and in that context, with some questioning, he suggested that it be a self-governing-body type of approach similar to the law society or the College of Physicians and Surgeons of Ontario, and that that self-governing body would also have some say in the qualification or certification of mediators or the so-called neutrals. Do you think that policy has any merit for the province?

Ms Curtis: Well, it is pretty hard to disagree with Gordon Henderson. The bar association does not have a position on whether mediators should be a self-governing body, but the bar association would support some kind of standards being set for people who hold themselves out as mediators, and some kind of certification process. There is a real problem right now in that just about anybody can say, "I am a mediator," and have cards and letter-head printed up and hold himself out as skilled in helping families resolve disputes, and he may or may not be skilled.

1140

The Chair: Do you think a graduate lawyer is capable of being a mediator right off the top?

Ms Curtis: Not without mediation training. I am not at all suggesting that lawyers are trained to be mediators. The lawyer-mediators that I used have taken mediation training.

The Chair: You indicated, I think, that the quality of the deal is what is important, not the fact of the deal, particularly referring to mediators and the fact that mediators are more inclined to want to make a deal. That is a type of bias. We have had a number of expert witnesses who talked about the necessity of the process. These were lawyers—these were not non-lawyer mediators—saying that the process was particularly important in family law, and not necessarily the quality of the deal, the amount of property or the amount of money that a party walks away

with at the end of the deal. Do you have any comment on that perception that was left with the committee from other witnesses?

Ms Curtis: It is really important for people to feel when they sign that agreement that they got a fair deal, they got the best that they could under the circumstances, whichever spouse you are acting for, whether you are acting for the weaker spouse or the stronger spouse.

The Chair: They seem to be talking about issues other than property.

Ms Curtis: I was not talking specifically about property either. I was talking about people's feelings about the deal. The process is important, but to some extent reaching an agreement outside of court has become sort of a god to be worshipped in family law, and there is so much pressure on the clients to settle, as well as on the lawyers, that sometimes improvident deals are reached. That deal is going to end up in litigation, and also the lawyers involved are probably going to be sued. I am not interested in being a party to a deal that I think is not in my client's best interests, first of all, because my first job is to protect my client and, second, because I am smart enough to want to protect myself.

The Chair: You mentioned that you have about 10 cases that you have referred to mediation at the present time. What is the profile of the case? Was that initiated by request of the client or clients, or was it at your suggestion that it go mediation? From your personal practice, how does it get from your desk to the mediator? Why? What are the factors that drive it to mediation, if I can put it that way?

Ms Curtis: That is a good question, but you will not be happy when I tell you there is no profile for a case that goes to mediation. Some clients raise it with me in the first session, before I even get to consider it as an option. Some clients, we try a little bit of lawyer negotiation and then we talk about mediation and they try it at that point. As I said, people are quite knowledgeable about family law and about the process. Some people come to me already having talked to two or three mediators and basically are already into the process and want to use me as backup, if you like, and want to bounce questions off me, so it is different. Also, the range of issues that are currently being mediated in my practice is the whole range. I have several families that are doing sort of full-service mediation with a lawyer-mediator, and I also have some families that are doing exclusively custody and access problems with a mental health professional.

The Chair: Thank you. I do not see any other hands up, so I will assume that that is all the questions the committee has for you. We have gone almost half an hour over your limit, so I thank you for your patience. Your presentation was very useful to the committee, and we appreciate the extensive answers to the questions on the part of the committee members. Thank you very much.

Ms Curtis: Thank you very much.

ONTARIO ASSOCIATION OF INTERVAL AND TRANSITION HOUSES

The Chair: Our next group is from the Ontario Association of Interval and Transition Houses, and the two witnesses are Eileen Morrow, who is the vice-president, and Trudy Don, who is the co-ordinator. Please come forward and commence the presentation.

Ms Morrow: My name is Eileen Morrow. I am vice-president of the Ontario Association of Interval and Transition Houses.

Ms Don: I am Trudy Don. I am the co-ordinator of the same organization.

Ms Preston: I am Joanne Preston. I am the assistant co-ordinator of OAITH.

Ms Morrow: We have a brief, so I would just like to read the presentation into the record.

We are here today representing a total of 68 interval and transition houses throughout Ontario, which sheltered well over 85,000 women and children in the past six years. During these years, the staff of these shelters have spent thousands of hours counselling and supporting women who have arrived at our doors in search of safety from violence for their children and themselves. We have accompanied them to court and sat through long hours listening to lawyers defending violent husbands and recommending to judges that a man's violent behaviour does not affect his ability to be a caring husband and father in the future, once he has received some counselling.

The Canadian Advisory Council on the Status of Women, in a report published in 1987, shows that 44 per cent of battered women continue to be assaulted after separation or divorce. In fact, separation frequently means an escalation in violence as the batterer no longer feels that he has control over his victim. So we have come here to raise some serious concerns about any suggested alternative dispute resolutions. By this term we understand, when used in connection with the crime of wife assault, a diversion from the present criminal justice systems would be explored by such means as dispute assessment prior

to court hearings, such as pre-trials following the first appearance, such as mediation, enforced joint custody or conciliation services.

We are joined by many prominent family lawyers who also oppose these suggested resolutions because (1) they put abused women and their children at risk for continued harm; (2) they send a message that wife assault is not a crime but an unfortunate manner of behaviour that can be rectified by mediation and counselling, and (3) they place the responsibility on an intake-assessment worker to make life and death decisions.

Why, then, are these alternatives explored? Since the Attorney General advised police commissions to lay charges in situations where reasonable and probable grounds exist to believe that an assault took place, many more men have been charged. As a result, our courts have not been able to keep pace with this increase of cases. The courts are clogged, and this has created delays and increased case lengths. Court costs have increased, and it has been suggested that the time of judges could be better used.

We have explored the needs of women who are battered as expressed to us by the women who come to us for assistance. We have also attended meetings with groups called together by the Department of Justice, Canada, where a broad range of criminal justice approaches to wife assault were explored. Some of these approaches included the multi-door courthouse, pre-trials involving the victim, mediation and involuntary joint custody or presumption of joint custody.

The following are the needs of women who are battered, according to the women themselves.

1. She needs protection. A woman who has been assaulted by her husband needs to know that the police will come promptly if she calls them; to know that the police will provide her with at least temporary safety by removing the man from the home; to have the choice to go with her children to a safe place; to know that the police will charge her husband or partner without asking for her opinion; to know she has access to the full process of the criminal justice system and a speedy delivery of that justice.

2. She needs validation. A woman who has been assaulted by her husband or partner needs to see and hear through the words, actions and attitudes of people in authority that she is believed; to see and hear through the words, actions and attitudes of people in authority that they regard wife assault as a criminal offence; to be told that she is not alone; to be told that she is not responsible for the violence; to receive

support without judgement from police, social workers, lawyers, judges and other people in authority, and to be taken seriously by people in positions of authority.

3. She needs honest, realistic, consistent and complete information to help her make informed decisions. A woman who has been assaulted by her husband or a partner needs to be told the intricacies of the court process; to be told there may be times when she may feel attacked; to be advised that she can use the civil and family court systems, as well as the criminal court system; to be kept informed of decisions made and schedules set in the court system; to be told she is entitled to support and help throughout the justice process; to be told that the criminal justice system has been empowering for many women when they felt they were listened to and consulted throughout the process.

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5. She needs to be treated justly. A woman who has been assaulted by her husband or partner needs to believe that she has full access to a justice system which is not driven solely by winning cases; needs to live in a community which does not label her as a victim but as a survivor and sees her violation as an experience all women and children share potentially or actually.

6. She needs financial independence to enable her to have real access to the justice system. A woman who has been assaulted by her husband or partner needs money to cover her legal fees; money to support herself and her children from the time the man is apprehended and throughout the court process so that she is not forced to make decisions based on financial duress; freedom from fear that she will lose her home and other possessions before she is given the financial support she needs.

Various models have been presented as alternatives to the court process and we will deal with these one by one.

(A.) The multi-door courthouse has been suggested to us. The model presented to us by the Justice Group, Canada outlines a centre offering "sophisticated and sensitive" intake services along with an array of dispute resolutions under one roof. This is sort of your package deal.

A screening unit at the centre would "assess citizens' disputes" and then refer the parties to the appropriate door for handling the case. Agencies such as the police, the crown attorney's office, courts, legal services, health and social services and other community-based front-line

services would refer people to the multi-door centre.

Intake officers would attempt to resolve the disputes during initial contact either through telephone conciliation, by giving additional information, by referring to the most appropriate available dispute resolution mechanism or by referring to other community services. In this model, arbitration, mediation, conciliation, joint custody and adjudication would be institutional in the criminal justice system and structured to fit individual needs.

What is wrong with this model? It assumes that the sophisticated and sensitive intake officer would be able to assess the gravity of the situation, presumably sometimes by telephone interview, and make appropriate referral. It presumes that there is neutrality in the approach and that the intake officer is fully schooled in understanding the specific needs of a woman who has been assaulted by her husband or partner. It also places the gravity of the crime of wife assault on the same level as a neighbourhood dispute, a business dispute or squabbles about pet animals.

The suggestion that in fact the intake officer could refer the woman to mediation or conciliation does not take into account the needs of the woman to see and hear, through the words, attitudes and actions of people in positions of authority, that they regard wife assault as a criminal offence. It also suggests that the criminal offence of wife assault could bypass the criminal justice system, thereby sending a message that wife assault is not a crime in all situations.

(B.) Pre-trials with victim present: This model was suggested as an alternative to avoid the length of time elapsed since the offence took place, due to the present enormous volume of cases, whereby it is often impossible to elicit the view of the victim until the morning of the trial.

In certain cases a pre-trial would be scheduled within several weeks of the first court appearance, at which time both the accused and the victim would be in attendance. The victim would be subpoenaed, or alternatively, requested to attend by telephone or by letter. Suitable cases for pre-trials would be identified by the crown attorney and the request to set up a pre-trial would be made on the accused's first appearance in court.

At the pre-trial, the crown attorney would interview the victim and discuss the case with counsel for the accused. Others present could include the investigating police officer, the

victim-witness program co-ordinator and, possibly, advocates for the victim and offender.

At the pre-trial, the case would be dealt with in one of the following ways: a plea of guilty and sentence; trial date set; charge withdrawn; the accused entering into an undertaking to keep the peace, or a peace bond; or, the case is adjourned to a later date without a plea to allow for certain action on behalf of the accused, such as making restitution, attending counselling, mediation, etc.

What is wrong with this model? There are a number of problems.

1. Attendance at the pre-trial of victim and accused together is intimidating to the victim. Intimidation, fear, threats, etc would influence the victim's responses.

2. Assessment by the crown attorney of the suitability of the case for referral to this model prior to having spoken to the victim, the police, the lawyer and so on.

3. The possibility of adjournment of the case while offender undertakes counselling. Research from the United States suggests that the long-term effect of counselling of violent men is not generally positive.

4. Participation in mediation where the bargaining power of the victim is endangered.

5. We question whether this option does help to reduce court time or would simply shift expenditures to another setting.

(C.) Mediation, and this is moving into the family law area of ADR. The Advisory Committee on Mediation in Family Law was appointed by the Attorney General as a result of the Attorney General's interest in ADR techniques. The committee came to the following conclusions, among others:

"Mediation in family law matters is a voluntary, nonadversarial alternative dispute resolution mechanism in which an impartial mediator assists clients of a 'relatively equal' bargaining position to reach a mutually satisfactory agreement affecting the family. In doing so, mediation tries to assist clients to come to an agreement in the hope that it will encourage increased compliance with the agreement and thereby reduce the need to turn to the court for enforcement or clarification.

"The mediation model offered in Ontario should be comprehensive and therefore available for any or all family issues. Mediation offered in accordance with the model proposed by this committee should not include mediation of family violence.

"While mediation should be voluntary, the delivery of a publicly funded mediation services or access to the family court process should be subject to a procedural requirement for a one-time attendance at a public legal education session early in the process."

What is wrong with this model? Mediation and other ADR systems are considered because of problems in the court system, which is seen to be time-consuming, expensive, rigid and so on. The perceived advantages of mediation are the disadvantages of the court system. Therefore, mediation becomes merely a cheap solution to solve a bigger, more complex problem in the court system.

Mediation can create great risks if parties are unequal in bargaining power. Men and women enter mediation with an inherent power imbalance favouring the man. Therefore mediation is a dangerous process for women.

Power imbalance dynamics between men and women renders fair, equal mediation impossible. Women are usually the financially dependent spouses. There is a sexist power dynamic underlying all negotiations between men and women. Women are not socialized to put their needs first. Their needs are often defined in terms of their children.

Mediation is a risky option in all family disputes, but especially dangerous in situations involving wife battering. It is preposterous to think the battered woman and her attacker could sit at the mediation table and bargain as equals. The acute power imbalance which is at the root of the violence makes mediation impossible. If mediation is forced in these circumstances, the woman would certainly be intimidated into a settlement.

To quote disturbing data from the Richardson Study on Mediation, an unpublished report commissioned by the federal government, "60 per cent of lawyers would send their clients to mediation if there was extreme hostility; furthermore, 70 per cent of lawyers send their clients to mediation even if there is wife assault or child abuse." We can assume that these lawyers must represent the husbands, if lawyers are more inclined to mediation for the more dominant party.

(D.) Joint custody; voluntary joint custody agreements: When a separating couple decides to agree to a joint custody arrangement for its children, one presumes this decision is made by friendly partners. Moreover, one presumes that there will be adequate financial arrangements which would allow both parents to avail them-

selves of the necessities of life and special needs of the child or children. It becomes clear, therefore, that these arrangements could only be feasible for the affluent members of our society. For a mother living in subsidized housing the arrangement would be impossible, as she would not be entitled to an adequate housing unit unless she could show that her children were permanently under her care.

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Research conducted in the United States indicates that, whereas initially joint custody was regarded as a great success, it soon became clear that the data were based on friendly, highly motivated and generally atypical divorcing couples. Current available data indicate that the earlier conclusions are incorrect at least for the typical case. Relitigation rates are high among families who enter into joint custody agreements where there is some clear indication that the courts may impose it anyway. Most negative of all are the reports from children in joint custody situations, which reveal that the constant upheaval is far more unsettling and stressful than was initially anticipated.

Involuntary joint custody arrangements: When considering the abovementioned drawbacks of voluntary custody agreements, it becomes clear that the consequences of a court-mandated joint custody order are even more detrimental, both for the primary care giver, usually the mother, and the children.

The presumption that it is "in the best interest of the child" shows a lack of understanding of the emotional turmoil a youngster experiences. In light of research conducted in the United States, which indicates that, with constant upheaval, together with a confusing set of rules and circumstances in living arrangements, even in cases where the joint custody agreement was made voluntarily by both parents, it becomes obvious that where this arrangement is imposed on parents who are unwilling to share total responsibility in the upbringing of the child or children, these consequences become more severe.

We are particularly concerned about the cases where violence has been the reason for separation. In the courts, the mother may not have been able to prove that the children were abused by the father, but she is aware, as is now shown in studies conducted by Dr Peter Jaffe of the University of Western Ontario, that the witnessing of abuse by the father has emotional consequences on the children which may require many years of counselling to rectify. Because she

is concerned for the welfare of her children and is afraid that unless the father does not continue to be involved with the family he will continue to control the family, she applies for sole custody of her children. The father, however, fears that he might lose control over the woman and the children and also realizes he might get a better financial deal by agreeing to joint custody.

In dealing with custody matters, judges will consider which parent has shown a greater willingness to facilitate access to the child by the other parent and to co-operate with and involve the other parent in the physical, mental and emotional wellbeing of the child. It is easy to conclude that the violence victim who insists on sole custody to protect herself and her children will be seen to be the "less co-operative parent."

We are concerned that the relationship between family violence and custody issues is still being largely ignored by judges. We have stated earlier in this brief, concerning mandatory mediation, that the unequal power balance between men and women in violent family relationships makes it impossible to suggest that there could ever be "equal rights and responsibilities in the decision-making concerning the child's education, health care, religious training and, where practical, shared residence" as recommended in statements supporting presumptions of joint custody.

Conclusions: We recommend that, before any form of ADR is considered for legislation, the needs and the safety of battered women are examined more seriously and the following questions must be answered to the satisfaction of the victim herself and her children:

1. Does it provide protection for the victim?
2. Is it effective in stopping further violence?
3. Is there a balance in bargaining power?
4. Does it act as a punishment or deterrent?
5. Does it interfere with the criminal justice process?
6. Does it interfere with the victim's rights?
7. Are all services adequately in place, such as supervised access, to insure the safety of the woman and her children?
8. Is enforcement of agreements available?
9. Are all those involved in an alternative system aware of the issue of wife assault?
10. Is the alternative merely a cheaper solution to the complex problems of our court systems?
11. Who really benefits from this alternative?

The Chair: Is that the end of the submission, that report?

Ms Morrow: Yes, it is.

The Chair: Good. Mr Jackson, you have a question.

Mr Jackson: Eileen, thank you again for an excellent brief. I know you have personally presented five or six briefs in the last two years before Legislative committees all generally related to this area.

Ms Morrow: I am going to get it tape-recorded. I am just going to bring it in.

Mr Jackson: Each one of your presentations does bring additional and new information, and I appreciate that very much. I am going to ask you a question I asked a lady who was here representing an open-door type of program from Washington. I was intrigued by the notion that across North America we have a problem sensitizing our judges to deal with the issue of assault and violence, and clearly the federal government is finally reacting to it. I know the provincial government has not, but the federal government has finally reacted to it, and is talking now about courses in intervention with inappropriate judges.

But, given the importance of the position of a judge, the years of training, the very open and public fashion in which a judge conducts the fairness of the trial, yet we have all those cases where victims of violence have not been served well in the judicial system. How can we assume that we will get a mediation process or achieve a mediation process which is sophisticated and sensitive? I am interested in your response to that question, then I will tell you what the person from Washington says.

Ms Morrow: How can we assume that we can have a sensitive and sophisticated—

Mr Jackson: It is not working with the judges. How do we expect it to work with mediators?

Ms Morrow: I would hardly be the person to agree that we can achieve it, you are quite right, with everyone watching and supposedly, you know, with the highest level of expertise in the land on these issues. We have despicable things being done to women who are assaulted in criminal courts and in family courts in this land. I do not think it is possible to put this issue into any kind of mediation process whatsoever. It would be reprehensible, frankly. I do not even think that it is incorrect or inappropriate; I think it would be reprehensible and dangerous.

Mr Jackson: I understand that the Ontario Advisory Council on Women's Issues has made a clear statement similar to the one you have just made condemning mediation when there is even a hint of family violence, although that has not

been presented to this committee. Hopefully, research will get a brief response back through the chair, Sandra Kerr or their violence subcommittee that has been studying this matter, but that has not been presented in context before this committee. But I think it is important that the official advisory group to politicians in this province has condemned very strongly the notion of mediation where it affects family violence.

My next question to you has to do with the issue of the interministerial committee dealing with violence. We have sort of gotten disjointed responses from the government in terms of where it is in the loop, whether it is funding, support for rape crisis centres, support for interval or transition homes, safety in our subway system, whatever. There are 14 ministries that are dealing with this. We have not seen the report as yet. Do you have an understanding of where the Attorney General is coming from or where that committee and its deliberations is coming from with respect to the issues of mediation and family law and domestic violence? Do you have any indication at all of the direction in which they are going?

Ms Morrow: I believe there are a number of different interministerial committees, in terms of violence against women, and there is a specific one related to wife battering itself. It is co-ordinated by the Ontario women's directorate. As far as I am aware personally, and you can correct me if I am wrong on this, we have not had any kind of formal statement from the interministerial committee as a whole on its position with regard to mediation. We do have a very strong statement from the Ontario women's directorate, but I do not think we could necessarily assume that the Ontario women's directorate position on mediation speaks for the interministerial committee. As far as I know, it has not made a statement as an interministerial committee itself.

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Mr Jackson: I am referring more specifically to the ministers responsible for women's issues, both the predecessor, Mr Sorbara, and the current minister, who have indicated that for the last year and a half there has been an interministerial committee involving 14 ministries dealing with the general issue of violence against women and that they were to report some time ago with respect to responding to a number of issues to get all the ministries better co-ordinated. What we have been trying to get a handle on through this committee is just what the thinking is in the Attorney General's office in terms of the future direction it sees for family law in this province as it specifically relates to victims of violence.

Ms Morrow: So you are talking about the Attorney General's office?

Mr Jackson: The Attorney General's ministry and its relationship to the 14-ministry interministerial committee dealing with this issue. We have not seen the report as yet, but I am just wondering to what extent you have had input or feedback with respect to where the government is coming from.

We had a presentation from the Attorney General's office. It just dealt with mediation generally. It did not deal with the specific issues which I have now raised, but we are led to believe they have been studying them for the last two years.

What we are trying to do, as a committee, is to draw out just where the thinking is. We know where the Ontario women's directorate is coming from, we know where the Metro Action Committee on Public Violence Against Women and Children is coming from, we know where OAITH is coming from; we know where all those groups are coming from. We have not heard from the government in terms of the last two years of its discussions and studying. Are they proceeding in mediation in spite of all this advice? Are they listening to it? We are just trying to get some feedback on that we have not gotten that from the AG's office, yet. I wondered if you have any feedback in this area that you can share with us.

Ms Morrow: If they do not tell you, I think it is unlikely that they are going to be calling us to let us know first, but our understanding is that they have the report of the committee encouraging mediation, with a sort of dissension from the Ontario women's directorate and an alternative point of view from the Ontario women's directorate, which was also involved in that.

Steven Offer, when he was assistant to the Attorney General, clearly made statements in the standing committee on social development here regarding Bill 124 that clearly indicated, to me at least, although he may have a different point of view on this, that in fact the Attorney General's office was planning to deal with mediation in legislation and would be preparing its own mediation legislation and that this was the direction in which it was going.

Ms Don: May I just add about the interministerial committee that it is my understanding that it has been asked in effect to do an evaluation of the process, what has been happening in the last two years as far as both criminal and family law and the violence against women were concerned? That report was due next January. We have been

involved with some preparatory work to do some of that evaluation.

Mr Jackson: I wonder if we could as well request from research if we could get a clear statement from the AG's office on the issue of family violence and mediation, if in fact it is willing to make a clear statement that under no circumstances will it consider it, or whatever the nature of the statement it will make on it. I know both the New Democratic Party and the Conservative Party have made clear policy statements that under no circumstances will we consider that. We do not wish to lead the AG in this regard, but I suspect that it would be helpful to this committee if we knew that this is an area where the government would be unwilling to proceed. I think that would be helpful in terms of our subsequent recommendations in terms of family law mediation.

The Chair: First of all, you referred to getting additional research material, which I assume that the research staff can do and make available to the members.

On the question of the Attorney General and any policy statements, this committee has decided to invite the Attorney General to come here as a witness, and we would expect that he will be here. The type of concerns and questions you are raising now can be put personally and directly to the Attorney General.

Mr Jackson: On page 10 you reference the Richardson Study on Mediation. Is that available to research at the moment?

Ms Swift: Yes, I have a copy of that. I am not entirely sure which one they are referring to. It may be the divorce and family mediation research study of the four Canadian cities. Is that the one you are referring to?

Ms Don: I believe that is the one.

Ms Swift: Yes. Then I have it here.

Mr Jackson: It is probably a large—

Ms Swift: Yes, it is fairly large.

Mr Jackson: That is what I was afraid of. I wondered if we could get a summary of the point that is raised. The information that is contained in here is rather horrific, sort of that the legal community offs the violent cases to mediation, for a variety of reasons. I think this bears examining in a little further detail, and I wonder, without putting research to a tremendous amount of effort, if we could get a summary of that point and the basis on which it is made.

Also, on page 11, OAITH has referenced the fact that when another committee of the Legislature was dealing with joint custody late last year,

it was clear that the California model was being cited as a model to be held up, and yet at the end of those hearings, research was shared with that committee which indicated that a longitudinal study of the effects very much indicted what was going on in California.

I wonder as well, since there may be a summary of that available, if that could be shared with the committee as well. I know that it was something I raised with Michael Cochrane when he was before us as the first deputant discussing his area of expertise, which is in family law mediation and joint custody, the concern that I had that we were still promoting the notion that California had a wonderful system when in fact there is evidence to contradict that. I certainly would want the committee to have both sides of that equation.

The Chair: I wonder if perhaps that can be raised tomorrow. I understand that Mr Cochrane will be back before us tomorrow afternoon, and of course he was the principal author, I guess, of the report of the Attorney General's Advisory Committee on Mediation in Family Law and the type of research material that you are referring to. In fact, that committee report can be addressed directly to Mr Cochrane tomorrow.

Mr Jackson: I do not want to take up a lot of time when—

The Chair: The research staff will certainly provide whatever the committee members want in terms of background material. It is available without too much difficulty and I am sure that the research people will provide that to you.

Mr Jackson: I do not wish to engage in a futile debate with Mr Cochrane. He has a completely different view of family law mediation and support custody than I do and I do not wish to take the committee's time entertaining a debate on that. I am satisfied if the committee has access to the information so that we can make our own independent judgements about this very sensitive area.

The Chair: We will provide the material you are asking for, I am sure. However, I will just remind you that Mr Cochrane is coming back for the second time at your request, I guess to continue the questioning and answering or the debate, depending on how you want to characterize it.

Mr Jackson: I do not think it is appropriate for me to have a debate, but if it is of no value to the other members of the committee, it is probably because they have not had an opportunity to look

at the material I have been suggesting they should have a look at. I will leave that to your guidance.

My final question has to do with support enforcement, point 8 on your very last page. I thought that was a valid point. Now that we know the Attorney General is coming, certainly we will be able to direct some questions about the reports we are hearing that support enforcement is now in some instances nine months to a year backlogged.

That obviously has implications to mediating in a perfect situation, but the reality is we do not have the support programs for women and their children, whether they be independent supervised access programs where violence is occurring, for which we have two models in Ontario without provincial funding, or whether the basic ability of a woman and her children to survive on the support payments which are not coming materially affects the kinds of decisions that are made in mediation, knowing all along that there is this financial and institutional imbalance between the victims and the perpetrators.

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You may wish to expand on that point for us, but certainly it will be a point we will raise with the Attorney General, because you cannot separate the issues of your ability to survive financially, your ability to survive a power struggle and your ability to have a safe supervised access program for your children, who have been witnesses to violence or the victims of violence.

Ms Morrow: It is very important for committee members to understand that everyone wants to live in a world where things are as they should be instead of as they are. People who work with victims of violence are certainly far and above the most vociferous people in encouraging nonviolence and encouraging peace-keeping and peace-making, so when we make our statements opposing mediation and conciliation and joint custody and those kinds of alternative dispute resolution mechanisms for assaulted women, we do not do so because we believe in or support more conflict or an adversarial situation. We do it because we are experts in this field and we know what happens to assaulted women when these things are used, and what happens is not an end to conflict.

In fact, we have research from York University, the LaMarsh Research Program on conflict resolution and violence, which shows that in fact when women go to conciliatory lawyers, they are 35 per cent more likely to be further abused and to be in more danger than if they go to an

adversarial lawyer. If we go one further step into the conciliatory process, and that is mediation and conciliation, I think it is easy to see that the more conciliatory the woman becomes, the more likely she is to be in danger.

So I think it is very important for us to make a distinction between a situation where equal parties, with equal bargaining power, voluntarily choose to go this route. They want to go to mediation and mediation should be available for them, but we oppose legislated mediation or any kind of encouragement of any description, whether it is an orientation session or anything like that, that would interfere with direct due process of law for that woman, because what happens to an assaulted woman is that she is going to want to conciliate. She is going to want to have the least amount of trouble, because when there is trouble, she gets hurt. She spends her whole life saying, "Okay, okay, okay," and when anyone suggests to her that she should go to mediation because if she does not she is being adversarial and people might get annoyed, she knows what that means to her and her kids. The chances are really good that if she is given any kind of pressure to do this thing, she will do it. And then what will happen to her? What will happen to her is that she will get hurt.

We are not opposed to mediation holus-bolus whatsoever. What we are opposed to is a situation where people like mediators—and you will have them come in here this afternoon and tell you, and the Attorney General will come in here and tell you, "We don't do domestic violence and we will never do domestic violence," but the truth of the matter is they do not recognize domestic violence when they see it. So they are in the middle of this thing, and all of a sudden this guy loses it and tries to attack his wife and they go: "Holy cow, this is domestic violence. I can't mediate any more." But, hey, it is too late.

It is very well and good for a mediator to say, "I promise I will never mediate in domestic violence," and that is very well-intentioned, they seriously do not want to hurt people, but the problem is they do not know anything about domestic violence. Very few people do. If you listen to many of the judges in this country making statements about homicide in domestic violence, attempted murder, sexual assault, child-stealing, common assault and every other kind of domestic violence, you will hear them making statement after statement that clearly indicate that they do not know what they are talking about, and it is making all of us in the

shelter movement, and battered women, very angry.

I am sick, so I have no patience, but I really want to make it clear to you that I do not care whether they say they will not mediate in domestic violence. That has nothing to do with it. And I do not care whether the law says a woman should never go to mediation if there is domestic violence. The problem is people do not know when there is domestic violence and so these people end up there anyway, right? I will just tell you about one case from my shelter.

The people in Hamilton's Unified Family Court do not do mediation in domestic violence, so why is one of my clients going to mediation? She is in a shelter. That means domestic violence. That is all we do at Interval House. So right away they know there is domestic violence, but his lawyer says, "Go to mediation." Her lawyer says: "You know, you want to look co-operative. You should go to mediation." The judge says, "I think these people need to go to mediation." The assaultive man certainly wants to go to mediation. That is exactly what he wants and he is co-operating up one side and down the other with mediation. The only voice which is saying, "No, I don't want to go to mediation," is the woman's. And everyone is looking her and saying, "Everybody agrees that mediation should be tried in this situation." She looks like the person who is interfering, is digging in, is unco-operative, is trying to delay things and not be reasonable.

So what does she do? We say, "Dangerous, dangerous." She says, "I have no choice," and so she goes to mediation. Our court worker calls up the mediator and says: "Look, this is domestic violence. Why are you doing this?" And she says, "Well, if there is any trouble, I assure you that I will not." Mediation takes place and the woman just gets cheated and cheated. She is scared and she keeps coming back and saying: "I don't know what to do. He keeps saying this and you keep saying this, and then he phoned me and he said, 'You'll be sorry'" etc. That is what happens in mediation. Have I said enough?

Mr Jackson: You can never say enough until we change the laws in this province. I commend you and thank you. I wish I had time for more questions. Mr Chairman, thank you for your indulgence.

The Chair: Thank you, Mr Jackson. We do have about five minutes left, Mr Kormos, so if you can—

Mr Kormos: What do you mean, five minutes left?

The Chair: We have taken up the extra half-hour.

Mr Kormos: Oh, I am sure these people would stay for questions from any number of people. I am not going to be—oh, you have the flu, I forgot. I should not have, because I had it in November and December. In any event, I come from down in Welland-Thorold where people like Mae Harry and Adele Tanguay, now working out of Women's Place, have done incredible work with judges, with crown attorneys, with lawyers and with the community in general in trying to upgrade the level of attentiveness—more so consciousness—about what the problem is and how it should be addressed.

I agree with the committee that a discussion of alternative dispute resolution is warranted, and perhaps some models should be discussed, but I am concerned that it is being presented or talked about as if it were some sort of cure-all, as if it were going to supplant the criminal justice system or the justice system in general.

Mr Jackson alluded to these problems, as did you in your presentation. Let's talk about the case. There are some notorious American cases that receive, rightly so, publicity regularly about abused children and, perhaps even more sadly, sexually abused children. We all know that merely because a criminal charge cannot be substantiated does not mean that the person against whom the allegation is being made is innocent. It simply means that there is not enough evidence to prove him or her guilty in a criminal court.

It seems to me—and you have spoken about this; and have you heard the two lawyers representing the CBA before you?—that if I did not have the facts on my side, if I did not have the law on my side, I would opt for mediation. I would have my best shot at it from the weakest-perspective scenario. I appreciate what has been going on in some of the family courts and criminal courts about, let's say, in this context sexual abuse of children, but it seems to me that in a mediation context where the goal is compromise, where the goal is give and take—and I cannot think of how anybody could avoid that conclusion in discussing mediation; the goal is give and take—I see the risk of the rights of, let's say, children or mothers being violated is far stronger in the mediation context. Again, you have spoken of this, because the pressure is on her, "Well, give a little, bend a little, move a little," when in fact there may be no bloody way and her better—not a perfect, we know that from

too many examples—course of protection is from a courtroom and not a mediator. I cannot think of any way that mediation can ever overcome that problem. So maybe mediation is best suited for big contract disputes between mining companies, where they are dealing with dirt and ore rather than with people and people's lives.

1230

I am concerned about mediation not only in the context of violence in the family, but in family conflict in general, because its emphasis is on give and take, on compromise, on bending. It would seem to me that in the minority of cases, the smallest number of cases, perhaps mediation would be appropriate and not infringe on rights that the community and the law should be protecting. Is that a fair analysis?

Ms Morrow: I do not know, but let me answer and then you can tell me whether—I actually did not answer Cam's questions, so let's be fair; I will not answer yours right now.

Mr Kormos: Well, that happens to me every day during question period, so don't feel badly.

Ms Morrow: Yes, right. You ask me a question and I just say whatever I feel like saying.

I think it is true—and you have probably heard this 100 times by now—that the people who are most likely to benefit from mediation are the ones who do not want to go to court anyway and who are not going to need to go to court. To say that the people who have the highest degree of conflict in their situations are the ones where there is the highest degree of hostility, in our business what that means most of the time is that somebody is attempting to control and abuse somebody else. We know that almost always it is the male. That is just the truth and we can prove it.

We have a situation where you have people suggesting that these bitter custody battles, the ones where there is an incredible amount of hostility, are the ones where we need to cool things down and send them to mediation and that this in fact will cool out the hostility. What we are suggesting is that when you have that degree of hostility, dollars to doughnuts, you have domestic violence. Anyone who knows anything about domestic violence knows that there is not any cooling out. That does not happen. You are suggesting a scenario where there is not any possibility of compromise and I agree with you. That is—

Mr Kormos: Maybe not "is not," but, more important, where there should not be any possibility of compromise.

Ms Morrow: This is right, that is what I mean. But there is no possibility of compromise because what compromise means is that you are asking that woman to compromise her safety, you are asking her to give up her human rights in order to reach an agreement. You cannot do that. That is just not just. If we are talking about justice, that is not just in a democracy. You cannot say, "This is aggravating, it's taking a lot of time and it's costing a lot of money and what we need here is for you people to be reasonable, so you have to give something."

When we talk about domestic violence situations, what she is going to end up having to give up is her safety and her right to a freedom from fear for herself and her children. That is the sad fact of domestic violence. What that means is you are asking that woman to give up her human right to be free of fear and to be physically safe. You are asking her to do that on behalf of her children as well in many cases, and people just do not see it that way. I wish that people who look at domestic violence and talk about legislation and justice and these terms, which only mean what we put into them, would see this issue as a human rights issue when someone is in a position where, in order to give, in order to compromise, she has to compromise her human rights to be free of attack and violence. You cannot ask them to make that kind of compromise, and so that person is right to say, "I will not give, I will not give one inch," and she should not give.

I do not know if that is what you were talking about, but that is true. When we talk about really high hostility and high conflict in separations, there is a very, very high possibility—we know that 50 per cent of them involve abuse. We know that 50 per cent of women who are separating identify abuse. That is all separating women. I am not talking about the ones who are in conflict over custody or some other family law issue; I am talking about all of them. So the chances of the ones who are in high conflict in court situations having abuse as part of the picture is exceedingly high.

Because there is all this conflict in the courts and these people will not get along and they do not care about their children and all these kinds of spurious implications about people who are involved in this situation, it would be inaccurate to say, "We'll put in a clause dealing with domestic violence and that will take care of the minority of people where this will be a problem." I believe, and our experience in the shelters is, that the majority of them are probably involving some kind of control and power issue and

violence. When you get that happening there is no compromise, because he cannot let her win. If they go to mediation, and he does not think that he is winning, he will escalate the violence. He will have to win in the end, and if that means killing her, so be it.

Mr Kormos: Albeit that any number of us could criticize perhaps any number of judgement or judgement calls, a judge, or even a jury, because a jury goes through a very short training process by virtue of its role in the courtroom, is prepared to say to people, "I don't believe anything you say," is prepared to reject entirely bits of evidence. It seems to me that a mediator, by virtue of his role, would be harder pressed to point out the person who would be prepared to misstate the facts to achieve his own goals, again because that would destroy his effectiveness, that would negate his role as a mediator. But a judge—and I think it is a very important thing to recognize about the court system. To fine-tune and improve on the court system is a goal that we should all have, but let's not desert it or abandon it. It has some very special qualities, and that is one that comes mind in view of what you just said. When you have opposing versions of facts a judge is prepared to and trained to name the liar, identify the liar.

Ms Morrow: The courts in fact have certain mechanisms at their disposal and powers to further investigate and discover who is saying what and that sort of thing, which mediators do not have. In terms even of things like financial assets and that kind of thing, the courts have the power to investigate those things that mediation does not have. Other people have made the point before us in terms of women giving up their financial support rights and property rights and things like that; assaulted women do that all the time. In terms of, for instance, financial enforcement of support orders and that kind of thing, many assaulted women who go into these processes where they are asked to deal and this kind of thing, even in the court system it is bad enough.

Often assaulted women will give up everything to have the children and to be safe and not have him have any access to her. She will give up her financial support, she will give up her home, she will give up everything because she feels that no one has her safety at heart and they cannot keep her safe and she is in there on her own trying to make this deal. She will trade these things off. She has no money to do this kind of fighting. She has no money to keep herself safe. That happens all the time as well to assaulted women, and I am

sure to lots of poor women as well, but to assaulted women it happens all the time because they are afraid and they do not want to make trouble. So they do not want enforcement of financial orders and that kind of thing, because then he would get angry because she keeps sending the law after him and he will come after her. So she says, "Just leave him alone."

Ms Don: I just want to add something to this. I just want to add to this was that there is certainly no way that we think the court systems are wonderful. We have a lot of problems with what is going on, the delays and all the rest of it. I would just hate to see this committee come to the decision that mediation is the perfect solution to that.

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I would like to know, for instance, what are the costs involved to clean up the court system or to set up very expensive mediation programs across the province. As it is right now, our women up in northwestern Ontario have hardly any services, be it either the justice system or any other service available. We are not going to pour a lot of money into setting up mediation programs which we do not even know they work. In fact, we have very strong suspicions they do not work. Why? Why do we not clean up what we have first, and then see if we need anything else?

Mr Velshi: I want to get into a different area here. We were talking about violence in the home where the separation has taken place and talking about court or mediation. What about the problems of the assaulted wife who refuses to move out of the home, who refuses to even acknowledge there is a problem or acknowledges the problem but from fear?

Ms Morrow: You mean she is still in the relationship?

Mr Velshi: Yes.

Ms Morrow: And they are both living together?

Mr Velshi: Both living together. We know there is a problem. How can we solve that problem?

Ms Morrow: How do you solve that problem? Are you referring to this in terms of a family law situation, because there would not be any legal—

Mr Velshi: Is there nothing legal that can be done? I have a matter before me right now, where we know the woman is being assaulted, we know that she is ill, she is seriously ill. She refuses to even admit that she is seriously ill and she just sticks there. The police refuse to take any action

and the community has refused to take action. I am at a place where I just cannot move, and we know the woman is going to die.

Ms Morrow: It is really hard to make any kind of comment about a situation. I can only comment on information that you can give me in two seconds. The truth of the matter is, when we are talking about domestic violence where the woman is still trapped in that situation, that sometimes that is what happens. There is nothing that can help and she dies. The problem we have here is a situation where that woman does not feel that there is any way out or that there is any hope and she has not—I mean, somewhere along the line, in probably many different ways, she got the message that (a) it is her fault, or it is partly her fault and, (b) even if it is not, there is not anything anyone can do about this. This woman may very well be in a situation where many assaulted women come, where they say, "I wish you would just kill me, because I can't go on like this any more and I can't get out."

I cannot go into a big explanation of why that woman would do that. It has to do with having a different perception of your situation. You may look at her and say: "I don't get this. I can do this for her, I want to do this for her, I want to rescue her, I want to help her. Why isn't she doing anything?" Her perception is that you cannot do anything. In order to change that you have to just keep making contact and keep making contact. I do not know whether you have enough time.

Mr Velshi: Do you think the law should be addressing such situations where either the family or friends or neighbours, somebody, can interfere or get involved in some way?

Ms Morrow: Except in a criminal matter there is not any legal way, unless that woman is assaulted, and then the police should certainly not be saying that they are not going to get involved. That is inappropriate police response and should be dealt with. They are supposed to respond and they are supposed to deal with it if there is a criminal situation happening there. If you know that that is happening, or you know that an assault is taking place, then certainly it is your right and your responsibility to call the police and get them involved, regardless of whether the woman's opinion is that they should not be involved at that point. She has to have her life saved at that point.

In all other ways we have to recognize that what happens to assaulted women is that the power and control and all of their human rights and choices are taken away from them. That is what happens in domestic violence. We have to

be very clear to make sure that she is given the opportunity to make that decision herself, otherwise there is not really anything that will happen. She has to make the decision herself to try to leave that situation. And what has to happen with people around here is that they have to give her that message, that when she makes that decision they will be there for her today and they will be there for her tomorrow and they will not give up on her. Even if she goes back they will not give up on her, and if she wants to come back out again they will do the same thing over and over again.

That is very hard, for instance, for families who see this pain and they just want to fix it. But this person is an adult human being. They have been in prison, they have been tortured and brainwashed. Their mind is controlled, their feelings are controlled and their actions are controlled, but they are still adult human beings with choices. And what has to happen is that they have to be given back their human rights; they have to be given back control.

For someone like you who is wanting to help, it is very hard to stand there and say: "I support your right to make a choice and I'm worried about you and care about you. As soon as you make that decision, as soon as you want any kind of help, I'll do anything I can." And that is all you can really do. You also have to remember that if something like that happens, you do not say to yourself: "It's my fault." Right? You recognize who did this thing and it was not you.

Mrs Fawcett: I really just want to make a comment. I want to thank you very much for your presentation. It has been very, very good to remind us all again and again and again of the horrors that are out there.

Ms Morrow: I know it might be quite boring after a while.

Mrs Fawcett: I guess if I can just say, in defence of the government, at least our Minister without Portfolio responsible for women's issues is trying very hard to address these issues. But oh, the mountain is very high, but we are very concerned. I want to thank you very much for your presentation.

Ms Morrow: I am certainly in no way wishing to say anything in terms of the minister at all—

Mrs Fawcett: No. I realize that; I know.

Ms Morrow: I am not necessarily here to trash the good things the government has done—just to make sure you do not do anything bad.

Mrs Fawcett: Right, but it certainly has cleared up and answered questions I did have.

You have answered them with everything you have said.

The Chair: I understand Mr Smith has one small question.

Mr D. W. Smith: Yes, just a short one. We hear a lot of different opinions here when people make presentations. Do you feel that your case will get better the more women lawyers and judges come into this? Do you feel that is going to help you at all?

Ms Morrow: I cannot think but that it will help. It does not necessarily mean that a female judge or lawyer is more sensitive necessarily to the woman's position or that a male lawyer or judge does not have the parts to do the job properly. I would never say that, but I would say that it would probably make a difference, just because females are socialized in a different way and they bring a different kind of perspective to these issues. So when you have males and females together, the whole community, and members of other cultures and so on and everyone involved in dealing with these issues together, I think you have everyone's perspective.

I think that when you are talking about a situation like the crime of wife assault, particularly, where the crime is caused by an extreme power imbalance between the male and the female because of the male-female relationship, I am talking about a very specific thing where the female perspective in fact would be extremely valuable.

That is not to say that I do not know female lawyers who have not done well in supporting our clients or that I do not know male lawyers—in fact, the lawyer we use at Interval House for most of our cases is an expert on domestic violence and that person is male and he is wonderful. The women in our house have nothing but good things to say about him. He is very sensitive to the issue of domestic violence. He is very sensitive to giving them control as a lawyer and to making sure that he is serving their interests.

I might also say, in terms of mediation and alternative dispute resolutions, that he is often accused of being inappropriately adversarial and he does not want to conciliate. He is considered a bad lawyer these days because he does not automatically send everybody to mediation, whereas the big trend, the vogue, these days is for everyone to be good lawyers and send everyone to mediation. You see? Now this man who is incredibly brilliant in terms of his work, wins his cases and protects the lives of women and children in family court is getting a bad

reputation as somebody who never wants to go to mediation. That is because 99 per cent of his case load is domestic violence.

Mr Jackson: You cannot have hassle-free justice when it comes to violence. That is what we are moving for.

Ms Morrow: Yes.

Mr D. W. Smith: It was a woman representative who made the comment that we might go more towards mediation the more women lawyers came into the system. I was just wondering if you think along the same lines.

Ms Morrow: That actually may be a possibility, but on the other side, that they would also recognize the situations in which mediation is really not appropriate.

The Chair: On behalf of the members of the

committee, I want to thank the Ontario Association of Interval and Transition Houses in the persons of Eileen Morrow, Trudy Don and Joanne Preston. I am sure that the committee members will take your views into account when we do our final report, particularly the very serious cautions you have indicated in the conclusions in your brief. So, on behalf of the committee members, thank you for coming here today.

For the members of the committee, we are adjourning until 2 pm, at which time Professor Howard Irving from the Faculty of Social Work, University of Toronto, will be our witness in the subject area of family law. The committee is adjourned until 2 pm.

The committee recessed at 1251.

AFTERNOON SITTING

The committee met at 1410 in room 151.

The Chair: Good afternoon. The standing committee on administration of justice is in the seventh day of an inquiry into the issue of alternative dispute resolution in Ontario. Today the committee is looking into the area of family law.

FACULTY OF SOCIAL WORK,
UNIVERSITY OF TORONTO

The Chair: Our first witness this afternoon is Professor Howard Irving, who teaches at the faculty of social work, University of Toronto. He is a major figure in the field of family mediation in general and court-linked conciliation in particular. Professor Irving, proceed, please.

Dr Irving: Thank you. You have in front of you a brief introductory statement that I have prepared and that tries to put family mediation in perspective for you without going into any major details. The details I will leave for either your questions or my further elaboration.

Mr Chairman, should we wait for the members to glance over this document? What is your opinion?

The Chair: Perhaps you could give a brief overview and then we will open up to questions.

Dr Irving: Okay. There are a number of issues that I would like to touch upon. The first one begins with the actual incidence of divorce and separation. As you will note on page 1—and this is according to Statistics Canada, which purportedly is a conservative element in terms of reporting these figures—approximately 40 per cent of all Canadian marriages will end in divorce and three quarters of these will involve children. That means that in North America this year more than 1.5 million marriages will terminate. That does not include the number of people who just decide to walk away from a marriage, which would include mostly poor people who cannot afford to do it legally.

Anyway, this high volume of divorce cases obviously puts a very severe strain on the court system. As you will note here, I have quoted a number of judges, one of whom is from Ontario, Mr Justice George Walsh, who is the head of the family law division of the Supreme Court of Ontario. I would like to read his comments and tell you a little bit about what the research has found, and then we can get into a discussion.

Mr Justice George T. Walsh, head of the family law division of the Supreme Court of Ontario, states his views this way:

"The recent amendments to the Children's Law Reform Act contain the only statutory provision in Canada for the resolution of family disputes by mediation....The acceptance of mediation as an attractive alternative and viable adjunct to the adversary process is a significant breakthrough in family law."

I want to underscore "viable adjunct." Mediation is not for everyone. Mediation, if you look at the research, has come up with a profile of those people who are mediatable. What it looks like, clearly, is that if there is serious family violence, either spousal abuse or child abuse, mediation may not be—in fact, I would suggest, is not—the recommended method of dispute resolution. I think those women need protection. I think they need to use the adversary system to the best of their advantage while protecting and providing for their children.

What I do think is important, however, is that a good number of people who are co-operative, who are reasonable people and yet still cannot resolve some of the conflicts between them in family law, really have nowhere to go, if we read the papers this morning, with Ontario being in the unique position—at least it was up until this morning, I guess—that given the moneys that might have been available, we still did not put them into mediation. That is, I think, an interesting comment in view of the fact that mediation really got off the ground here some 10 years ago.

What we have is probably two court-related people at 311 Jarvis Street who are available—I think the only people available, really—to help poor people who may have to or may desire to mediate their family disputes. My understanding is that with some 30,000 divorces a year in Ontario, two people are not even going to make a dent in the problem.

Furthermore, most of the mediation that takes place in this province is in the private sector, and most mediators charge anywhere from \$100 to \$150 an hour. So I think right away you get the picture that this is not for everybody. It becomes really quite an expensive proposition.

Why this has happened, I guess, is an interesting point in itself. I interviewed 53 lawyers who specialize in family law in the province of Ontario and were involved in a

research project, as I state on page 4. I asked them what benefits, if any, they felt there were to using mediation, because at that time the federal government had put some money into a demonstration project at 311 Jarvis Street. It went on from, I think, 1976 until 1979 and we had 10 mediators who were placed at 311 Jarvis Street. These were the lawyers who worked with those mediators and typically would have used the adversary system, and they said that it helped avoid unnecessary litigation, that it better prepared the parties to understand the issues, that it allowed the clients to use legal services more appropriately, again cutting down on costs, both from a psychological perspective and a financial one, and that it reduced the clients' emotional turmoil.

I might also add, since I was the research director in those days, that approximately 70 per cent of the people who came to that mediation project ended up with a mediated agreement and did not go on to litigate. The 30 per cent who did litigate we felt should have litigated and felt it was an appropriate place to resolve that kind of a dispute.

I am sure many of you are interested in the cost benefits of mediation. Clearly, that has to be on everybody's mind. If you look at page 3 of the document, you will see that approximately 75 per cent to 80 per cent of disputants who go to mediation will reach an agreement. That included 14 studies that we were able to uncover in North America. Hugh McIsaac, who was the director of the Los Angeles conciliation court, says it is about four times as costly to litigate than it is to mediate. In a research report from the prestigious Bush Institute at Chapel Hill, North Carolina, it was revealed that mediation would save US taxpayers \$9.6 million a year in court cases and divorced people \$88.6 million a year in legal fees.

There were also some very positive findings in research that was done in Toronto, Edmonton and Kingston. I reviewed all of that research in a book that I published a couple of years ago. I do not want to bother you with the figures at this point, but for those of you who may be interested, on page 238—the book is entitled *Family Mediation: Theory and Practice of Dispute Resolution*—I list about seven or eight studies that just look at the cost benefits of mediation versus litigation. You will see it in there, for those of you who are interested, or I will be glad to make a Xerox copy of those pages available to you.

But it costs at least two or three times as much to litigate as to mediate, and the results are very promising in terms of follow-up. The follow-up studies will say that most of these agreements are durable, whereas in cases that are litigated there tends to be a revolving-door process with a lot of relitigation.

I want to make another point before I get back to my little document here. Most family lawyers will tell you that we are really not talking about a lot of cases because most cases settle. I have heard that a hundred times. Okay, so what does that mean, to settle? What it means is that approximately 90 per cent of the people will come up with some kind of an agreement, with what they call a negotiated agreement, which is drafted between two lawyers.

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Now the problem with that is that you can have a two- or three-year negotiated agreement that can cost hundreds of thousands of dollars. So to say that an agreement was negotiated, or that people did not litigate, does not by any means mean that it was cheaper for people. As you know, many women are concerned about mediation as perhaps not representing women's interests; they are concerned about empowerment. I submit to you that if you take two lawyers in a negotiated settlement and one is far superior to the other, then I do not think the one who is being represented by the one who is not as superior is going to get a very good deal, even though the person will end up with a negotiated settlement.

In mediation, we feel that since both parties have separate legal representation and the mediator is supposed to be unbiased and is supposed to be looking at the process rather than the outcome, women—in fact, everybody—will have a better chance at coming up with an agreement that is going to be much more self-determining than having lawyers who act as adversaries negotiating behind the scenes.

The other issue I would like to raise with you before we open it up is that there have been a number of committees. I was quite impressed with the Report of the Attorney General's Advisory Committee on Mediation in Family Law. As you may know, they made 50-odd recommendations. I think I agreed with 49 of them, I do not know which ones, but I thought it was really quite a good study. I thought it was fair and I thought there could be some changes made, obviously, but the intent behind it was simply to provide mediation for people who are mediatable, and they spell out the conditions.

They rule out people who are involved in family violence; I certainly agree with that. They make a point that both sides should have legal representation. They are not in favour of mandatory mediation; they are more in favour of setting up what I think they call an information session, which basically would present people with a situation where they would come in and there would be an educational component: where that person would explain to people what the adversary system is, how it works, what mediation is, how it works, what happens to children in both formats, etc. I imagine there would be a push for mediation but it would be voluntary. The thing is that a lot of people do not know what mediation is and I think it would at least give them an opportunity to hear about it.

In Minnesota, for example, they bring judges in to talk to people. They bring lawyers in, they bring parties who have mediated in, parties who have litigated, to give everybody an opportunity to ask questions of people who would really be in the know.

My final point is, and it always gets down to this, how do we fund something? Let's assume that I am half-right with all of this research and that it does make sense with some people to have an opportunity to mediate rather than get into protracted litigation. We have not been able to settle on that. I presented to the standing committee on justice and legal affairs when the then-new Divorce Act was implemented, and everybody there in the committee was in favour of mediation but they said, "Who is going to pay for it?"

I think at the provincial level it gets down to, well, is this a matter for the Ministry of Community and Social Services, is this a matter for the Ministry of the Attorney General, etc? I think I would suggest that it is within the realm of the Ministry of the Attorney General, since these cases have to do with cases that are scheduled for the adversary system for possible litigation. That is one thing.

In terms of funding, we have never looked at anything novel. We have always looked at, "Well, this will be just added costs." In the state of California, where I did a sabbatical and I studied their system, there was a Senate bill passed and introduced by a private member, Senator Sieroty, 28 March 1979.

One part of the bill that comes right at the end and I think is the most important for our purposes is that they recommended, which was later passed, that whenever anybody filed a petition he would be charged a fee. If the petition had to with

a divorce petition or some post-litigation matters that came before the court, in those days it was \$15 that each side had to pay. They took all of those moneys and put them into mediation and counselling for children.

They now have 70 full-time mediators in the Los Angeles conciliation court who have been practising since 1976 or whenever this was, and they have the most sophisticated, the most noteworthy program. Everybody looks to California when he is looking at mediation or counselling for children whose parents are separating, and it is all financed by these filings. I do not know why it has never been looked at. Maybe it is impossible—I am not that familiar with the way these things work—but I just suggest that you might consider that as a possibility for funding this kind of a program.

The other thing of course is what we do typically, and that is we fund demonstration projects. There was one in Kingston. As I said, there was one at 311 Jarvis Street. The federal government funded one in Edmonton. The courts of the Unified Family Court all have a conciliation-mediation mechanism within them, but they go on some kind of a contractual basis from year to year. They build in evaluation. They all seem to be doing a good job, but they terminate and I think it is at the whim of whoever administers these programs.

I think we need to go beyond demonstration projects and come up with a funding policy that would institutionalize mediation, if you really believe that it is a viable and important method for people who are separating and who have children.

The Chair: Thank you very much. We have a list of questioners lined up for you, so I am sure it is going to be very interesting. First, Mr Smith.

Mr D. W. Smith: Thank you, Mr Chairman—

Miss Nicholas: Boy you're quick on the draw. You must have put your hand up before he started speaking.

Mr D. W. Smith: I found out the process, and that's what you do. You get your hand up, regardless.

Anyway, I have enjoyed sitting on this committee maybe more than I ever thought I would when I was first put on it, because I am not a lawyer and I thought justice was a little bit boring. We have heard a lot of witnesses over the last seven days or thereabouts, but the group that we heard this morning, especially the group from the Ontario Association of Interval and Transition Houses, seems to not want very much to do with mediation.

I thought when I first started reading your article here that you were almost the exact opposite, but you are not quite and I just wondered—this is only a hypothetical statement—if we were to propose legislation to get this mediation thing more in the public eye, would you suggest that we should legislate that divorce cases should be mediated? After listening to you, I am sure I likely know part of your answer, but I want you to expand on that a little more and maybe whether it is a divorce case with the children involved.

Dr Irving: I do not know if I have a fairly good idea of what they may have said this morning, but it probably has to do with cases of spousal abuse and family violence and child abuse, and they would not recommend mediation. They would say to you: "These cases should be litigated by zealots. These people should be treated under the Criminal Code." I agree with that. If it is a criminal case, I agree that it should go right through the criminal justice system and have nothing to do with mediation. I am unequivocal, for the record, as far as that goes.

But there are people who have family spats. I do not necessarily consider that family violence or necessarily spousal abuse. I do not know of too many marriages where you are not going to get a good deal of conflict from time to time, and I think that if people get pushed prematurely into the adversarial system—I do not know if you have read affidavits, but they tend to escalate the emotional quality that puts people into really combant positions.

What I would like to see is some way of having people try mediation, having it off the record, and if it did not work then they could move into the adversarial system and do whatever is necessary. I think as a first line, for people who have not been violated or accused, mediation should be a right.

I think the other part of your question is whether or not it should be mandatory. I think there should be a mandatory information session. In other words, as I said, people would walk into a room and there may be three or four other people there and it would just be a matter of learning about what it is and that is it. I do not think a judge should order it. I think it should be voluntary, but I think people should have an opportunity to know what it is about.

1430

Mr D. W. Smith: So if there is abuse, you say that the individual should be charged.

Dr Irving: I am not saying he should be charged. If the police lay a charge and it is a criminal case, it is not mediatable in my books.

Mr D. W. Smith: It should be settled even before the divorce proceeding.

Dr Irving: That is right.

Mr D. W. Smith: The other thing is—I was only using a hypothetical setting here because I do not know what this committee is going to agree to—you have said that this year alone in North America 1.5 million marriages will break up. How many of the breakups would you say are caused by abuse? Would you say it is well over half of them?

Dr Irving: I do not know if there are accurate statistics on that. I would think that among certain populations, typically poorer people, typically where there is alcoholism and drug addiction, you will get a very high percentage of abuse, but I do not know what the percentage is. I think we would have enough to do if we just saw the people who were suitable for mediation. Even if we had just 20 per cent, which I think is a conservative figure, that were mediatable, where they were not being abused, let's say, it would keep us busy around the clock at this point. I do not know what the figures would be, but I would think that if the literature says half then I would go with half. I think it has to do with the segment of the population.

Mr D. W. Smith: What I was thinking in my mind was that if there were so many that were generally caused by abuse and you have suggested that they have to go to court anyway, I do not know whether it would be a good idea to create legislation.

Dr Irving: I would think if you looked at it that very few were charged under the Criminal Code.

The Chair: Miss Nicholas, you are second.

Miss Nicholas: Thank you, Mr Chairman.

Mr D. W. Smith: You got your hand up quickly too, did you not?

Miss Nicholas: Yes, I know. That is why I could not believe you beat me.

I had a couple of questions. One was when you were focusing on cost savings. I do not think that should be the only focus of alternative mechanisms, but certainly it is one consideration, because as we know the justice system is a very expensive one and anything that would achieve the same results in less time for less cost is something we should always consider. When you compare mediation to litigation there is quite a disparity, but I wonder if that is always a fair comparison. Do you think that all those that go to mediation would have gone to litigation, or do you think they would have stopped the process somewhere in between, either a negotiated

settlement or a settlement prior to litigation on the steps of the courtroom, and therefore when you compare it, will it still be cost-effective?

Dr Irving: I would say it is a good question. We anticipated that problem when we did our research, so what we did was we took every other case that came into the family court. These people were coming in to litigate, not to apply for prep school. They were pretty serious about this. We took every other one. We used mediation for one and nothing for the other. We gave them some kind of counselling that they would have had if there were not mediation, so we did not think we were denying anybody a service on ethical grounds.

As I said earlier, 70 per cent of those people who came in arrived at an agreement. The others went right on to litigate. That might be a good example for you.

Miss Nicholas: Yes, because I know that they say only 95 per cent of all cases do not end up in litigation, and everybody has a different number, but it is quite a significant number of those who start out with that in mind.

Dr Irving: I think it is 10 per cent they say litigate, but I want to reiterate that point about negotiation. I think negotiation is still quite adversarial even though they never get to trial. With what goes on in prelitigation, in discoveries, in affidavits, what goes on in threats and counterthreats and costs that run up from \$200 an hour, I do not think we can dismiss that as people who are coming in for a half-hour and leave their lawyers' offices with an agreement.

Miss Nicholas: Obviously you have shown that one of the additional benefits to cost-effectiveness is happier parties. When they leave the room they may be more satisfied and sometimes that may be good enough in itself as an end to justice, what justice means.

Dr Irving: Yes.

Miss Nicholas: The other thing was in terms of direction as to what we as committee members should be doing in terms of when we consider alternative dispute resolution, and if we develop a policy or a report, what our suggestions should be.

One of the suggestions you made is our funding policy, that perhaps we should consider funding mediators or the mediation process. I wonder how that would compare to our funding of the court system. Now if there is a loser, and it is a win or loss, legal costs usually go to the losing party—family may be a little different, but certainly with many of the cases. Some of that is

you inherit the court costs. Not as much; usually it is more just the legal costs. How do you feel about the cost-effectiveness of that, or would it just be the whole mediator, the room, the process? Where it is confidential there is no transcription, but where they may need it—

Dr Irving: I do not think you could get involved in the private sector. I think that would take place the way it does now, which is usually on some kind of sliding scale where the parties, through their lawyers, would get together with a mediator. If you did it where I think it fits now in the public sector, attached to the courts, not unlike the recommendation that the Attorney General's advisory committee made, you would probably have the facility within the court structure, the room wherever you would do this mediation, and it would be simply either a judge making a referral or the lawyers themselves making their referral to the mediator.

The way it works in Los Angeles is that they are housed right in the court, so that gives credibility in the justice system. Lawyers like it because it is held within the court. They are not going to psychotherapy, or whatever you might think would happen to these people. They are getting mediation. The policies and everything are spelled right out. There is a job description. There are criteria. It is quite a professional look, and as I said, in California the way they do it, they just charge a tax for the filings so it is self-administered; it does not come out of any other tax base.

I think it is not unlike the Addiction Research Foundation and the way it is funded in Ontario. They put a tax, I think, on every bottle of alcohol that is sold and a percentage of that goes to rehabilitation of alcoholics. I mean, it is an idea. It works in California. I do not know whether it would work here.

Mrs LeBourdais: This morning we had two lawyers who came forward essentially against the mediation process as an alternative dispute resolution mechanism, although they said they used mediation substantially in their practice now. I think the reason they articulated their concern was the fact that they felt that in many cases the two sides did not come to the table as equal partners. They suggested that the partner who had initiated the breakup had done a lot of thinking about the process. They compared a five-step grieving process, if you will, with the person who had left the marriage being at step 3, perhaps 4, perhaps even 5, whereas the person who had been left behind was at step 1 and therefore at a strong disadvantage, particularly

on an emotional level. I wonder if you could just comment on that.

Dr Irving: It might be simple just to say for those people that they would need what we call "premediation." You just do not put people into mediation if they are at different places, as you described. You might work with one individually for three or four sessions. You might put one in a consciousness-raising group. You may do a lot of things to build up the other one so that you have this empowerment issue redressed so that they are both fairly equal. They are never going to be equal, as you know, in any relationship, but that is what we would do. If you were to come to a private mediator, that is the way it would work. You would not go right into a negotiation. You would go into what we call premediation.

1440

In my work I found that about 25 per cent of the people who came into my office were ready. They had both decided that the marriage was over, that it was too destructive for them and their children, and they were about at the same place. After two or three sessions they come up with a memorandum of agreement which they take back to their lawyers. The lawyers vet it. They look at it and the process goes that way. But for people who are not at the same place, as you suggest, I would just say that you hold off on the mediation until they are ready.

Mrs LeBourdais: I am thinking, though, that this might be a long process. If you take a marriage of a substantial number of years, 25 or 30 years perhaps, where the wife has stayed home and the husband, being out, being the major and perhaps the only income earner, with all of the confidence that being out in the workplace perhaps affords, chooses to leave the marriage, the wife is taken by surprise and is really at an emotional disadvantage that could take a year or more.

Dr Irving: Not mediatable.

Mrs LeBourdais: Not mediatable. So you are saying that would be a circumstance that is not appropriate.

Dr Irving: Yes, and I think that is the big argument for the women's directorate and the feminist critique that does not make too much sense to me, because you just do not mediate with those people.

Mrs LeBourdais: I see. Because I have been sitting on no-fault insurance for the last month, I am going to ask a question that is not directly related, but I am just wondering, do you see alternative dispute resolution, the mediation

process, in that sense as a form of no-fault divorce?

Dr Irving: I think wherever you can bring people together in a self-determining process, where they can get involved in the outcome of their situation in that process, you have a much better chance of them coming up with an agreement they can live with than one that is going to be imposed from up on high, whether it is insurance, whether it is landlord-tenant, whether it is a community dispute. We are even using mediation now between principals and teachers in the public school system, between students and teachers in the public school system. We are using it in the child welfare sector with parents going against the state where the state wants to take the children and put them into care, temporary wardship.

We are saying, "Let's see if we can mediate these." It works with people who want an opportunity to try to resolve their own problems. The caveat is that some people cannot do it, so for those people you do not use it. The key is that when you are doing your assessment to see who is mediatable, you take a look at these concerns that you raise. But I would think that if you do not come up with these concerns around empowerment or what have you, then mediation is viable for any kind of dispute resolution.

Mrs LeBourdais: I have one last quick question then. Do you feel that this is a process that is best suited to individuals who have perhaps substantial assets, rather than just issues of access with regard to children to mediate?

Dr Irving: I have seen people practically kill themselves over a coffee table and I have seen them do it over whether they should have one hour more a week with their children. It depends on the individual more than it does on the issue.

Mrs LeBourdais: So to some degree that child may be turned into an asset.

Dr Irving: That is right; exactly.

Mr Epp: Thank you, doctor, for coming before us. We appreciate the expertise that you are lending to the discussion here. I want to go back to the mediation and the litigation and so forth and try to get some clarity out of it, although I am sure we cannot get as much clarity in there as we would like.

When you first spoke you mentioned serious violence and abuse, that mediation should not be used. Then afterwards you mentioned that a family spat obviously was not abuse but something beyond that might be. I am just wondering, in getting back to that particular point, at what

point—we had these ladies here this morning who spoke about that and they felt that if there is any abuse, if there is any violence, then there should not be any mediation. They felt that in most instances they would try to embarrass the woman into mediation and then she would go in there having somewhat of an inferiority complex. She would be the only one that might oppose mediation and therefore she would kind of be singled out and she would go into it. Now that is where there is any kind of abuse or any kind of violence, and you seem to not make that much of a distinct difference between the two.

Dr Irving: No, on the contrary, I think if there is abuse alleged by one of the parties, typically the woman, the way to get around the concern of women, or of the women this morning who raised that, I would say is to let a family advocate sit in on mediation where there is an alleged dispute and make sure that this woman is not compromised, does not capitulate. They do it in the state of Connecticut, where anybody who goes to mediation and there is an allegation of any kind of abuse, they appoint one of these women—they are usually women, I think, in almost every case—who will sit with this woman and make sure that she is not compromised.

Mr Epp: Let me just clarify, and I am not trying to mistake anybody's position. They were saying that often what would happen is that the abuse is not recognized. Sometimes it is recognized but it is not attended to. For instance, they cited one case where the woman in fact was getting counselling and so forth by this centre and in fact they still put her into mediation when they should have recognized the fact she was there because of being abused. But you are saying it is recognized.

Dr Irving: You see, I think a mediator is trained to find that out. Let's take a look at their position. I think it is only fair that you look at both sides. You take a lawyer who practises corporate law on Bay Street and will take on maybe 10 per cent family litigation in his or her practice. Are they going to be skilled? Are they going to be aware of abuse? Do they even look at abuse? I do not think so, because I train them and I know. As well-meaning as they are, if you look at the law school curriculum, they do not have the courses that would help them uncover that.

In fact, I think they would probably feel that they are wasting their time if they do not move quickly into an adversarial situation, whereas a trained mediator, whether he be a psychologist or a social worker, has to look for that. That is part of their training. So I would think that a woman

would have a much better chance of having that uncovered in the mediation process than in the negotiating process.

Mr Epp: I have one other question. You mentioned that the mediator is concerned with process and not with outcome. Is this exclusively?

Dr Irving: No. If you feel that somebody is being compromised, that there is an empowerment issue that was raised earlier, then you have to be concerned. But typically, you focus on the process to make sure that they are communicating to each other, that they hear each other, that the issues are raised properly, that people do not get hit over the head with the furniture in the room and that kind of thing. I think that is the kind of process that is very important between disputants. I have done a number of them with lawyers and they typically use caucusing, so you have one in one room and one in another and you are going back and forth with briefs and recommendations, but the parties themselves are not involved in it. They say they are giving instruction to their lawyers but I think it is something else.

I guess the main thing is that you have to scrutinize to make sure that people's rights are being upheld in the process. You will miss it sometimes, but you always have the backup that each side has a lawyer to make sure that whatever agreement is made is vetted by the lawyers.

1450

Mr Kormos: I am interested in what mediation really does. To be simplistic, what is happening is, this committee is taking the justice system and courts, judges and juries and juxtaposing mediation with them and I am not sure that that is such a fair thing to do.

Dr Irving: No.

Mr Kormos: The government has been going into lawyer-bashing lately. The trend is to say, "Well, the justice system is not working," so rather than fix the justice system we are going to replace it with ADR. I say no, you are comparing apples and oranges. You are talking about two different things that serve two different goals, two different ends.

I say to you, if Cam Jackson, for instance, borrowed \$10 from me and did not pay it back when I believe he promised to pay it back, there is little that a mediator is going to do because he is taking a position, I want my \$10 and he does not want to pay it back. The mediator is going to organize a compromise. I would be a fool to settle for \$5. I am going to take him to court.

Indeed, if he denies borrowing the \$10, it becomes a matter of fact-finding. Once again, I am going to go to court. I am not interested in a mediator telling me that I should compromise in the interests of maintaining my rapport with him, because anyone who does not pay me back the \$10 I am not going to want to like in any event. So what does mediation offer? Do you see mediation offering anything to either Mr Jackson or myself in that type of scenario?

Dr Irving: I do not know whether I am going to get your \$10 back but I will make an attempt.

First of all, I always think that there is something underneath the issue of the \$10, the three days' access or the Christmas holidays with Dad instead of Mom. It may be, for example, that Mr Jackson felt that the \$10 had to do with a wager that he was not really serious about. In other words, you try to get underneath the issue of the \$10. What is it that really concerned him about not paying? You do that and you are able to appeal to people in their better judgement, to give them options, to have them think through what it is that is really troubling them, and oftentimes they will be able to tell you what the real issue is. Then, when you start with the real issue you can resolve the dispute.

Mr Kormos: One of the areas that causes me to question how this government is really approaching ADR is the inclusion of alternative measures in the Young Offenders Implementation Act, the fact that here in Ontario we dragged our heels and dragged our heels and that it was only once the Court of Appeal told us to implement alternative measures, which is ADR, that it was implemented. We seem to be on the one hand very reluctant to give effect to it, yet at the same time we applaud ADR because somehow it creates the impression of being, let us say, more civilized.

The other thing is, ADR is perceived by and large as mediation, yet that is a pretty restrictive perspective as well, is it not?

Dr Irving: Right, because it includes arbitration, conciliation and there are other dispute mechanisms.

I think if you looked at what happened with labour-management in terms of ADR, I mean, that was a revelation if you look back on what used to happen. Now they sit down and they—

Mr Kormos: I am sure Mr Rockefeller used to shoot them.

Dr Irving: That is right, Mr Rockefeller used to shoot them.

So I just think that the point you made earlier probably hits home for me, and that is that it is adjunctive and not to take the place of the adversary system. It works along with the adversary system. There should always be an adversary system. There should always be people who get their entitlements. But what if a psychological problem, a misunderstanding or that kind of problem is getting in the way? What do we do with those? I think that is where mediation can come in.

Mr Kormos: I have some real reluctance to endorsing ADR mediation as a general rule in the context of family breakdown. Reference was made to the fact that people from Ontario Association of Interval and Transition Houses were here this morning forcefully expressing some very strong concerns about mediation and what it can do, and more important, what it will not do. I still take the position that mediation will not work for the vast majority and indeed could be hazardous to the vast majority of family breakdowns. I am particularly concerned because there was much emphasis this morning on the incidence of spousal violence and family violence, violence against spouses and against children. Your comment, and I want to be quite careful about this, that this is more prevalent among poorer families and alcohol—

Dr Irving: Yes. There is a high incidence among certain groups. I am not saying that wealthy or middle-class people do not get involved in family violence. That would be a misunderstanding or I was not making myself clear. It is just that we tend to see more of it in certain segments of the population.

Mr Kormos: These are?

Dr Irving: Typically, underemployed poorer people where there are high rates of alcoholism and drug addiction. But that does not mean that it does not happen across the other segments. It is just that it tends to be more prominent in that group. But I do not even think that is the point, frankly. I think the point is, we do not mediate with those people. I do not see the argument. They are saying that you do not mediate with family violence, spousal abuse, child abuse, and the mediators are saying the same thing. I do not understand that, really. I am telling you that if you look at all the research, everything that has been said, the Ontario Association for Family Mediation, Family Mediation Canada, which is the largest professional group, will not mediate where there is family violence. It is in their code of ethics.

Mr Kormos: The difficulty obviously arises then in covert family violence.

Dr Irving: Right.

Mr Kormos: You and I may disagree about the prevalence of that. I appreciate what you are saying.

Mr Jackson: Professor Irving, I am a little disturbed about your description of violence and its expressions in society and your categorization, but I will leave that for the moment. I may come back to it if we have time.

My understanding of social workers, and I have worked a lot with social workers over the last 20 years, is that they respect the fact that their science is not an exact science—it deals with human nature—that invariably it is the relationship of that individual with some struggle in his life. Whether it is another person or a situation in the person's life, it creates this intrinsic tension, which involves all sorts of problems in his life, and social workers are very much involved in clarity and advocacy. I consider advocacy and adversarial approaches not too far apart. I consider them closer in terms of activities for people in the business of helping other people, which social workers and lawyers are essentially involved in.

What concerns me when I hear your discussion about mediation in family law, from your background as a social worker, is that you are not accounting for the various imbalances that many of your clients experience, whether it is a woman and her husband with respect to a marital breakdown and marital dispute or whether it is a child and his unequal position. Of course, social workers are very much involved in child advocacy. It is been badly needed and it is the fastest growing area of advocacy for human beings in this country and probably in North America.

So I want to ask you why you see this court system in a sense having failed and mediation holding within it a solution. It is on this issue of those vulnerable individuals. It strikes me that if a family is in dispute and coming apart, the courts are equipped to advocate directly for the child, who is singularly the most vulnerable of the three combatants, disputants or whatever, and the judge can clearly make distinctions in terms of how the best interests of the child are paramount. There seems to be a growing trend towards moving in an area where the child's best interests are somehow to be halved between the two remaining parents. That is a trend that fits very comfortably in with the mediation models, but

not necessarily in terms of the best interests of the child.

So my question to you is, how can you reconcile the fact that a child can have a clearly defined set of principles guiding his own protection through a court, but in mediation we have the quid pro quo? We have the two parties who are dealing with the matter and the child is just one more of the matters to be dealt with in a mediated environment.

1500

Dr Irving: Okay, but I think you are making an assumption that there is something wrong with the parents.

Mr Jackson: They would not be in this position if there were not some dysfunction in the family.

Dr Irving: I disagree with that entirely, with all due respect. There are people who separate, who have conflicts over their children, who are normal, who are not in any way, shape or fashion in need of any kind of therapy. They just need to sit down and resolve a dispute. People who live together in marriages argue sometimes and have a conflict about whether the child should play Metropolitan Toronto Hockey League hockey or not, which can lead into very destructive conflict, as most of you know.

I think that has been the problem with the legal system and the mental health system. People separate, they have children and they get into a conflict about that. Then there is something wrong. We have to bring in some kind of expert to make sure that the child is protected, to make sure that the parents are okay. I think in many of those cases they can be mediated.

Now, if you are talking about the others, where there really is a dysfunction, where there really is a problem, I do not advocate compromise. I do not think any good social worker would advocate compromise. I would advocate either getting some kind of help or litigation.

Mr Jackson: The court system in matters of custody, though, can make clear distinctions as to what is in the best interests of the child. The social worker or the psychiatrist, invariably, under difficult circumstances, is brought in to give advice to the court on behalf of the child, and the jury will decide whether or not it is friendly or unfriendly to either of the parents.

Dr Irving: Yes.

Mr Jackson: Mediation does not have within it that process, in my view. I have yet to be convinced that that exists.

Dr Irving: The way it works, again, when you talk about ADR, there are a number of mechanisms. Typically, a judge can make an order for an assessment, like the one you describe, or he can suggest mediation. So what might happen is, the parties go to mediation and they decide what is best for their children. They are in agreement. The mediator feels that nobody is being disadvantaged and it just becomes part of the agreement.

However, it may be that they cannot make a decision. So then it would go on to the next level which would be an assessment by a court-appointed assessor, whether it be a social worker, psychologist or psychiatrist, who would then make a determination, but that does not involve the parents. The parents are then in some kind of inquisitorial.

Mr Jackson: But it does involve the parents if they are consulted from the first point, which is, "Are you prepared to proceed with mediation, and if you are not, why not?"

Dr Irving: Yes.

Mr Jackson: This province just recently passed Bill 124, which deals with joint custody.

Dr Irving: It deals with access.

Mr Jackson: It deals with access, but as its guiding principle it says that the best interests of the child are served when both parents have access. That became a foundation principle for a judgement that we as legislators made for the rest of society and our courts will respond accordingly.

I did not support that legislation. I am very offended by it because in my view it creates an imbalance. I am entitled to my opinion and I am sure you will disagree with me.

Dr Irving: No.

Mr Jackson: However, it does sit at the root of what our problem is in our court system and why mediation cannot be the quick solution in those cases involving custody fights, which concern me the most because—I think you referenced it earlier in a response—the children almost become like an asset which is dealt with.

Dr Irving: Yes.

Mr Jackson: But you obviously are aware that in cases of violence which are not well known and well documented—60 per cent of the police reports fail to report cases of violence, because they just consider them domestic disputes of limited proportions and they do not report them, or because the family enclaves the situation and says: "There's no real problem here. I don't want it to come out that my husband's father beat him

years ago. So let's cover the whole thing up." There are a lot of things that indicate that women are reluctant to go to mediation.

Dr Irving: This seems to be a key point for people around the table. It is the job of the mediator to use his or her professional skills to uncover any possibility of any kind of abuse. That is the first thing we try to find out. Now, I submit to you, if these parties each go to a lawyer, is it the lawyer's responsibility to uncover that or is it the lawyer's responsibility to try to prove that it does not exist if you represent the alleged perpetrator? I am just asking that as a question. I do not know if you have a legal background—

Mr Jackson: Then let me respond. The lawyer responsible for the victim has a responsibility to his client and ultimately, by extension, to the child who is in that situation, to expose it and to have it exposed for what it was. If I understand our adversarial system well enough, and I am not a lawyer by training, they have an obligation in order to ensure that those facts come out in the best interests of their client. So I have no difficulty answering that question.

Dr Irving: I just do not think it happens. I just think lawyers do not do the kind of probing to find out if there has been that kind of abuse as I think a trained person who really is looking at that does. The lawyer's job is to win the case.

Mr Jackson: Okay. So let's follow that theme. If the lawyers are doing good jobs, then essentially when they come to the situation you described earlier of going before a judge and saying, "Look, Your Honour, we have a case of violence here," and the judge says, "Whoa. Well, let's look at this," the judge has already laid out on the table that mediation is an option. Now we have a lawyer who is deemed to be potentially adversarial, unco-operative; he is not helping the system get the backlog through, might even be deemed mercenary because he wants to go in and fight.

Dr Irving: No, because you are saying that there is an allegation of family violence. I am saying that is not mediatable until you prove or disprove that allegation.

Mr Jackson: I am with you on that point. So is everybody on this committee. The point we have come to understand and appreciate is that there is tremendous pressure for the woman not to appear unfriendly in court and, therefore, the whole onus rests with the woman that she now has become unfriendly to a mediation process.

Dr Irving: No, because that is not unfriendly to fight for your rights. If any judges think that is unfriendly, I think you have a bigger problem with the judiciary. I do not think judges are like that. I think judges are not interested in friendly-unfriendly. They are interested in justice.

Mr Jackson: The law says that the parent must co-operate. It is a new law, but that is now the law in this province. Any parent may approach the court and say, "Look. I don't think that person should have any access to the child."

Dr Irving: Yes. My understanding is that then they do an assessment. At least, according to the act they will do an assessment; not mediate, assess.

Mr Jackson: Okay. We are going in a circle here with this argument. I wanted to let you know that the concern we have in terms of family law is that no one has been able to assure some of us—I cannot speak for the whole committee—that these cases do not slip through. The classic example was a judge suggesting in Hamilton this month, with a woman who is in a shelter for abuse, that the case should be mediated. By definition, how can someone be in a shelter and yet be in a position to mediate? Yet the judge is proceeding with the case.

Dr Irving: I think it is wrong, but how about all the other cases where people want to mediate where there has not been any abuse—I mean, let's be fair about this—and have no place to go to mediate and have to litigate? You have to look at the other side of it. Sure, we can all pick out these horrible cases of abuse where the judge did not do his job, or a teacher; or a surgeon took out the wrong lung. I can give you a lot of cases, but I think we have to look at the majority of situations.

You take a province like Ontario where you have two people in the public sector who are doing mediation, and when you have the research that is highly supportive of it, I think it is pathetic, frankly. I agree with you on those other cases, I think that is unfortunate.

Mr Jackson: I wish we had more time. It would be unfair to finish our exchange on the point you raised about the poor and the under-employed. I think the statistics now bear that violence permeates all sectors. If there is any distinction it is that certain groups in society can better protect themselves because they have access to money.

1510

Dr Irving: Exactly.

Mr Jackson: I do hope you will correct that, because normally I would jump on somebody for that and I know you did not mean to say that.

Dr Irving: I meant unreported. There is a lot of abuse that is unreported, just like there is a lot of mental illness that never gets to the Clarke Institute of Psychiatry. You can hide it when you have money and that is what happens in these families. They buy it off somehow. I am just saying that if you look at the reported incidents, according to the criminal justice system, a high proportion comes from poor people where there is a high rate of alcoholism and drug abuse. That is all I am saying. It may exist and it may be more rampant in the wealthy class but it does not get reported. I think that is the commentary.

Mr Jackson: I appreciate your correcting that because I did not want to leave that on the record the way it was.

The Chair: We had two witnesses this morning from the Canadian Bar Association who are family law practitioners. And they really were saying that mediation is overemphasized. It is seen as a panacea in family law and, in those particular cases where it was appropriate, there should be lawyer-mediators rather than mental health practitioner mediation. What comment would you have on that?

Dr Irving: I think if it has to do with financial issues—child support, for example, property, spousal support—what we call comprehensive mediation, I think that you need somebody who is trained on the legal side and that usually is the case. But I think when it comes to child custody and access mediation, that somebody in the child welfare-mental health field may be more appropriate. Then there is also post-graduate training that both lawyers and nonlawyers are taking, which tends to sort of redress the imbalance in their education. So I would suggest that ideally you would have those kinds of people for those kinds of cases. And if you did have the money you might even consider co-mediation, where you would have a family lawyer and a family psychologist-social worker type working with the couple.

The Chair: What is the current practice now in terms of mediation in family law? Are there particular issues normally mediated, such as custody or what have you, or is it the comprehensive type? What is advisable from your point of view?

Dr Irving: I think if it became a money issue, if you had to take a look at where the best

investment would be, my hunch would be to try to do comprehensive mediation because a lot of the issues become interrelated. You start out looking at custody and access and you find out money is a big issue here and that has to get resolved. So I would go for the comprehensive, even though there are some people who are not that familiar with it. I think, given the proper training, a family lawyer and a social worker or psychologist could get the training that would help them do comprehensive.

The Chair: These two legal witnesses indicated that in their opinion there was a bias on the part of mediators, and the bias is that they work towards an agreement and any agreement is a success and not necessarily the right agreement. Do you have any comment on that, I guess, accusation of a general bias on the part of mediators?

Dr Irving: I think that if the bias is that you believe in self-determination for people, that would be without any question—I think anybody who goes after an agreement that is not worth the paper that it is written on is silly, because it will come back. In fact, it will not even come back, it will go right to litigation. So an agreement in and of itself is meaningless. It is the durability of the agreement and the relevance of the agreement that is important. I would disagree with that. I think you cannot look at agreements, you have to look at the parties, you have to look at how they negotiate with each other and it has to be their agreement.

The Chair: Last week we had a presentation from Gordon Henderson, the past president of the Canadian Bar Association, who is very active in ADR. He suggested that, from a policy point of view, there be a legislative framework dealing with the whole issue of ADR. Upon further questioning, he indicated that it would be along the lines of a self-governing body, such as a law society or colleges of physicians and surgeons, and it would govern the ethics and the qualifications of mediators, arbitrators. What is your comment on that? Do you think Ontario could use that sort of overview in terms of legislation?

Dr Irving: I think it makes sense. I think you need credibility and you need standards. Right now you can sell rugs all day and do mediation tonight. That is just not right, obviously.

Family Mediation Canada, which is this kind of an organization and has 10 federated chapters in the provinces, has attempted to do just that, except it does not have any legislative clout behind it. It is strictly voluntary. But it has standards and ethics and it has training programs

and it has about 600 active members across Canada. That is just family mediation at this point, but it is growing to bring in people who are getting involved in insurance type mediation, landlord-tenant disputes, etc.—what we call omnibus mediation.

I think there should be a professional organization that should govern the people who are doing that kind of work.

The Chair: You have been described as the major figure in the area of mediation. Would you say that Ontario has a discernible or broad-based policy on alternative dispute resolution?

Dr Irving: That Ontario has one?

The Chair: Yes, would Ontario, in your opinion, have a broad-based policy?

Dr Irving: No, I do not think it has any, at least not that I am aware of.

The Chair: Do you have any specific policy recommendations? That is why we are here as a committee. We are looking for input from people in the field as to where the government should be going in terms of policy.

Dr Irving: I think where they should be going, basically, is to make sure that education for the training of qualified mediators is made available. We do not have that. I have run programs now, for example, through University of Toronto continuing education and through the law school, and it is minimal.

I think if there was some money to be put into the training of mediators and the standards of practice, that would help. But I think along with that, to have some centres in the areas that need it the most, depending on the statistics, as a demonstration. In other words, along with the training you could have people actually doing the work. Otherwise, to run courses without having a facility where people can use mediation, I think, would be to no avail.

That is what I would recommend in terms of beginning policies: the setup, to put money behind an organization like the Ontario Association for Family Mediation, let's say, if we are just talking about family at this point, to support training programs and to have demonstration projects in a few centres across Ontario where they could actually do the mediation.

The Chair: You are also described as an expert in court-linked conciliation. What is the status now in Ontario, in your opinion, of court-annexed or court-linked mediation?

Dr Irving: Very weak, unfortunately. As I said, there are two people at 311 Jarvis. I do not even know their training, I do not even think they

are trained as mediators. I think they were court workers who were asked to do this.

In the Supreme Court of Ontario they have an Ontario association—I think it is called the Family Mediation Service, which really is a private group of people. I am one of them, so I know a little bit about it. Clive Chamberlain, a psychiatrist, is a director. They have an office on Queen Street and the judges and lawyers in the community make referrals, but these people have to pay, if I am not mistaken, \$100 a hour, plus they have to have lawyers involved. So it has really been a service for upper-middle-class people. It is the only other one that I know of, other than the one in the Unified Family Court in Hamilton. Other than that, we do not have anything.

The Chair: I am not asking you to do the government's research for it and you could not do it in five minutes but, generally speaking, what types of processes could you envisage as possibilities for court-linked mediation or conciliation? I am thinking in terms of three or four areas: in corrections, for example, in the civil area, in family law, in criminal law. What types of processes would you envisage as worthy of our consideration as a committee? It is a pretty broad question, but we are trying to get just a sketch of the types of things that you might recommend.

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Dr Irving: What would I recommend? The report of the Attorney General's Advisory Committee on Mediation in Family Law put a lot of time and energy into that project. I think if the other areas who are considering mediation, who are considering alternative dispute resolution—if you had a committee, let's say, in criminal justice, in civil litigation, doing the same kind of thing, to do some basic research to see what is available and to make a recommendation as to what might be suitable, that is where I would begin.

I do not know. You asked me the question and it is a very good question, but because I am not in those areas I really cannot answer them. I can talk somewhat about the family area, but I do not know enough about the criminal, except in other jurisdictions in North America they are using it.

Mrs LeBourdais: I have one very quick question. I was just wondering about the definition of "settlement." Is a good settlement the one that is as close as one can get to a win-win situation for both sides, or is that just a little naïve?

Dr Irving: I think that would be ideal. If both parties are in agreement and both of them talk to

their lawyers about their agreement and the lawyers say, "This is a fair agreement," then I think that is great. The only thing I would add, and you have not mentioned this, is it goes beyond the agreement. We feel that mediation has to continue past the agreement and that people should have an opportunity to get some help in working out the agreement, because it is one thing to agree on paper and it is another thing in practice. So, please, if you are advocating a policy, do not let it terminate on the signing of the agreement. To me, that is sometimes the beginning of the process.

Mrs LeBourdais: I was going to say, so often, as we know, that agreement is never carried out and never adhered to.

Dr Irving: And sometimes they should be. People change, the children's need changes and you have to be fluid enough to update it and make it sensible.

Mrs LeBourdais: So you feel it should be a recurring process.

Dr Irving: Absolutely. I do most of my mediation, interestingly enough, after the fact. I get a lot of referrals—it may seem silly to people—about the agreement that is spelled out in their separation agreement not being upheld. So rather than relitigate it, they will go to mediation to see if they can bring about a resolve.

Mr Jackson: Briefly on that point, what you have triggered is what was concerning me with the recent legislation on custody and access, because the way the legislation was written, it put it back into a legal context and not into a mediated context.

When we had gone through all the knock 'em, sock 'em, dragged-out legal business, we are going back to court again just because so-and-so did not show up. I would appreciate your brief comments in terms of that area because no one seemed to catch that point after four weeks of hearings, whether it was the supervised access element of it with mediation services—as you know, the two pilot projects in Ontario have a strong component of that and it is independent. Yet, the legislation as we now have it in this province really forces people to go back into court where the woman now has to explain, "How much alcohol did you think was on his breath when he was an hour late?"

Dr Irving: I am against that.

Mr Jackson: Good. I am delighted to hear that. You just went up 10 notches in my books.

Dr Irving: The other point I would like to make, just related to that question, that you

people will have to deal with, unfortunately, is, in the act it does say "supervised access." There is no supervised access, in the same way that there is no mediation. I am sort of concerned about it because what happens when a judge takes a look at this and he makes an order for supervised access? There is no place to go.

I have, right now, five students doing their research theses on supervised access in Ontario and I will be glad to make that report available.

Mr Jackson: I would like to see those.

Dr Irving: Yes, but right now there is nothing. There were one or two—I think there is still one. There is no money that is going into those projects, so that if the judges are serious about this and they start making referrals for mediation or supervised access, they will run into a lot of difficulty.

The Chair: I want to thank you very much, on behalf of the members of the committee, for coming here and giving us the benefit of your advice. I am sure that your comments will be taken very seriously in the report that we finally prepare for the Legislature. Thank you once again.

Dr Irving: I should add that I was a witness in the parliamentary committee in Ottawa. Not that I am trying to be a good mediator, but this was a much more productive session. I felt at that time people were more interested in their own politics than trying to get at the issues, so I commend you.

The Chair: Thank you very much.

Mr Jackson: A totally disarming statement.

Mrs LeBourdais: But refreshing.

FAMILY LAW REFORM COALITION

The Chair: I will ask the next witness to come forward, please. The next witness is Mary Lou Fassel, who is a lawyer with Fassel and Sadoway, a member of the steering committee of the Family Law Reform Coalition and director of legal services with the Barbra Schlifer Commemorative Clinic. Ms Fassel, if you would please proceed.

Ms Fassel: Let me just clarify a few things. I am no longer with the firm of Fassel and Sadoway. That was a family law practice I engaged in before going to the Barbra Schlifer clinic.

Right now, as you said, I am the director of legal services at the Schlifer clinic. The Schlifer clinic provides in part legal services to women who are victims of violence, including battered women. The Schlifer clinic is a member of this

new organization which is called the Family Law Reform Coalition.

I think I should mention to you that the Family Law Reform Coalition is a very broadly based coalition of organizations, professional people and individuals who formed precisely because of the family law reform agenda of the provincial government. As you know, in the last few years there has been an enormous amount of activity in family law reform in this province, and the members of this organization who have come together feel very strongly that we are approaching family law in a very haphazard and a very premature, unconsidered fashion. We feel that we need to slow down a bit and not only do some far greater investigation of some family law reform proposals—mediation, of course, is the most recent—but also some pretty broad consultation with the community at large about what people view as being appropriate.

I think also that I want to begin by emphasizing that I am here not only as a women's advocate but also as a person who did practise family law. I find it consistently difficult to deal with the kinds of representations that are made about family law litigation to you by mediators primarily and by other proponents of mediation.

I am sure that some of the comments I am going to make will probably sound pretty repetitious. I understand you have heard from the Canadian Bar Association—Ontario and from the Ontario Association of Interval and Transition Houses, so some of the things I am going to say are probably going to be very similar. But I think that, all in all, there is a very simplistic kind of view presented of family law litigation by mediators, as there is a very simplistic view of mediation presented by mediators.

I believe, I hope, I was a pretty strong advocate for my clients when I practised family law, but I would never have considered myself unduly adversarial or adversarial simply for the purpose of being adversarial. In fact, very few family lawyers I ever related to were. I think that the family law bar has developed well in the area of negotiating and settling. I am sure you have heard the statistics about the level of settlements that are achieved in family law generally. I really do not think there are many members of family law bar who do that this kind of win-loss, winner-take-all approach to family law.

The division of legal rights, whether it is with respect to custody or with respect to property, is not all that clear-cut, and there are not often winners-losers in family law; there is one party that wins some and loses some and the other party

that wins some and loses some. But this notion that it is as aggressive winner-take-all as it is, I think, is a gross oversimplification of what we in the profession are all about.

I want to begin by talking a little bit too about the so-called popularity of mediation. I think we are a little bit schizophrenic in what we view now as the popularity of mediation, because it is being touted all over the place. We are being told that there is great demand in the public for mediation and we are being told it is the wave of the future and it is here to stay, and everywhere, particularly in the United States, it has proven to be the preferable dispute resolution method. But at a grass-roots level I do not see this great outcry for mediation. In fact, at the grass-roots level there is obviously, as I am sure you are aware by now, a lot of concern about mediation.

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There is a lot of concern that it is simply not going to be the answer to all the problems that beset families in the process of separation in this province. That it will address the costliness of litigation, that it will reduce the acrimony that exists between spouses during a separation, that it is more humane, more sensitive, that it will meet the needs of both parties more substantially than are met through litigation and primarily this notion that mediation is in the best interests of children are really claims made by mediators that are very much unfounded claims.

I am sure you have become aware in the last several months, if not in these hearings, that just about everybody in the world right now claims that what he or she is doing is in the best interests of children, but there is very little evidence anywhere to suggest that systems like mediation or some other systems that have been advocated, things as well like access enforcement legislation, are really in the best interests of children at all. I think we have to be very cautious about those kinds of claims.

We are also told that agreements arrived at through mediation tend to ensure that there will be a greater relationship between both parents and the children, that agreements arrived at through mediation will ensure somehow that there is greater compliance with support provisions or support orders. We are told that agreements arrived at through mediation have greater longevity, people are more faithful to those agreements. I am just not really sure any of those things are true, and I really object to the implication that these are now well-established notions about mediation. I do not think yet there

is any research that would suggest that any of these things are true.

In answer to the question of who is really touting mediation as being as wonderful as we are being told it is, I guess the obvious answer is that the mediation profession is touting it.

We also know that the fathers' rights movement is touting it. If you look at the manifestos of American and Canadian fathers' rights organizations, their manifestos usually include: (a) a commitment to mediation; (b) a commitment to joint custody, and (c) a commitment to lower child support and spousal support orders among other things.

These are the same organizations, of course, that are disenchanted with the property reforms that have been implemented in this province, that are concerned about the criminalization of things like wife assault and that are concerned about the treatment of men accused even of sexual assault. They have a whole host of equally progressive ideas when it comes to relations between men and women. Those are the people who are large proponents of this system, which I think should cause mediators some alarm.

Of course, it is also being touted very aggressively by the Attorney General's department and the policy advisers there, who have spent a lot of energy and time in the last few years taking this system to the community—at least not to the community but within the legal system.

Aside from these three groups, I am not really sure there are an awful lot of people around who are convinced that mediation is going to be a better system than we have now, which is not to say that there is not interest in it, because there is. But it is to say that most people are quite cautious or feel a need to be cautious about jumping into an alternative system that is unproven. I think it is significant that despite all the claims that mediation makes there are so few advocates for it.

If you look at the research in Canada, there is not a great deal. There is Professor Irving's research and there is James Richardson's research that was contracted by the Department of Justice. Those pieces of research are equally not conclusive. I am not a social scientist, and I am reluctant to critique that research from a social scientist's point of view, but I have read it and I am very confused by it and very unclear as to what it is really telling us.

Certainly even in my uneducated approach to that research, it does not at all appear to me that the recommendations are substantiated by the data, at least the data that are visible. What is

more, I find the research is very, very replete with ambiguity, with very unclear definitions, very unclear methodology, and I think one of the things we may want to do in the long term is do some critiques of that research or figure out how to do some very good research.

The only thing we may with some assurance be able to say from the research that exists is that some people who mediate are happy with it. Of course, the point is that those people may very well be the ones who are predisposed to being happy with mediation because their values or their inclinations may be to work out private agreements between themselves that are fair. Whether they are the best sample to look at in this research is questionable.

I want to talk to you a bit about the California experience. I do not know how much of it you have already heard about, if any. I do not know if you have actually read the California Senate task force report on joint custody and mediation. I hope I do not bore you with it, but I think it is very important for us to consider and it is very instructive.

It is so for a number of reasons, the first reason being that the California system is the one that has been continually touted to us as being the model for our reforms. California is said always to be in the avant-garde of family law reform. What California does first, every other state in the union and Canada does second. There is the model, there is the most wonderful progressive work that is being done.

Second, I think that it is instructive to look at California because it has now had joint custody and mandatory mediation statutes for about eight or nine years. They have had that experience with it. I think it is also important to look there now because they are also rethinking those statutes and rethinking the impact of joint custody and mandatory mediation.

So, as a preface, I would urge you to read the report, if you have not already got it. California enacted joint custody legislation in 1980 and mandatory mediation legislation in 1981. The California Senate task force reported on its findings of those statutes and how those statutes are working in June 1987. Approximately a year and a half later, in September 1988 I believe, there were some major amendments made to the joint custody legislation to try to redress some of the problems that had developed since the 1980 statute was passed.

The Senate task force reviewed both the statutes and the system of joint custody and mediation to try to determine the economic and

emotional impact on families of these systems, the impact not only on families generally but specifically on women and children. Some of the following remarks focus on its findings with respect to joint custody and mediation. I want to address also the joint custody remarks, because I think it is almost trite to say that where we have mediation, we are going to have joint custody. They seem to be inseparable. Where there is mediation, there is joint custody and that seems to be almost exclusively.

I think it is also very important to note that the Senate task force examined joint custody and mediation in a very interesting way. They compared, on the one hand, voluntary joint custody agreements with, on the other hand, court-imposed joint custody agreements and mediation-influenced joint custody agreements. So they have the court-imposed and the mediation-influenced joint custody agreements on one side, and what they refer to as the voluntary joint custody agreements on the other hand. I think it might be interesting to explore why they devised their research or their examination in that way.

One of the things that they have very clearly said in the report is that California enacted this custody reform, both mandatory mediation and joint custody legislation, without adequate data or studies of their emotional and economic impact on all divorcing families. The studies that were done—it seems to be kind of like we are repeating that history—they say in this report were done on very small samples of people who tended to be affluent, middle-class, white families and who were simply not typical of the average California family.

They recommended, among other things, that the judicial council in California immediately fund a study on the impact of this legislation and specifically indicated that research was needed to evaluate the impact on children of court-imposed and mediation-influenced joint custody arrangements.

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In its research the task force found, among other things, that women continued to shoulder the major responsibility for raising the children, which I do not think would be a surprise to anyone. They referred to federal census data of 1985 that indicated that in 90 per cent of all cases, women are still the custodial parents of children. They also referred to their own research in Los Angeles County Superior Court cases in which they found that in 85 per cent of all cases, regardless of whether it was joint custody or sole custody, women were still the physical custodi-

ans of children. In only six per cent of cases did parents actually share physical custody as well as joint custody, and in only another six per cent did fathers actually have physical custody of children.

Despite these facts and despite the enactment of the joint custody statutes, they say that there has yet to be any systematic study of the economic and emotional consequences of these reforms. They also say this despite the fact that the report, their research, indicates that there is some evidence that these reforms either have or at least have a greater potential to further erode the economic stability of women and children after divorce.

One of the reasons they say that is the case, of course, is because with mandatory mediation and joint custody comes an increased use of custody as a negotiating tool for financial settlements, which generally tends to result in lower support awards. I think also, in terms of court-ordered joint custody, there is a usual presumption that if a mother and father will share joint custody, then the father is going to be spending more time with the children and therefore automatically incurring greater living expenses with the children, which is not necessarily the case.

Because of these kinds of concerns, the report recommended that California's custody statute should be clarified to reflect the fact that there should not be a presumption in favour of joint custody in California. It also indicated, interestingly, that there is a series of specific factors relating to how you determine the appropriateness of a custodial parent that should be incorporated into the actual statutes and that both judges and mediators should be required to consider these factors in determining whether joint custody is appropriate. Clearly there was a perception that joint custody was almost being considered as a *prima facie* arrangement without any real consideration of whether it was appropriate.

The task force found that joint custody, which it says is a complicated arrangement—it takes special parents and special children to make it work—and the obvious failure to appropriately evaluate parents and children have resulted in inappropriate awards and inappropriate mediated agreements of joint custody that are harmful to children. It also found that research has indicated that where joint custody is voluntary and derived from a harmonious agreement between the parents, the child's psychological adjustment is better than when joint custody results from either

court-imposed or mediation-influenced joint custody.

It also found, interestingly, that parents in court-imposed or mediated joint custody arrangements were—this is a quote from the only piece of research in California that exists on this to date: “Parents were more hostile, physically abusive, distrustful towards each other and had difficulties communicating.” The researchers noted that “it seemed that the contact and expectation of mutual involvement between these parties seemed to exacerbate their distress.” That, of course, is very much the opposite of what we are told mediation should do for parties who are already experiencing some difficulty.

On mediation specifically, the task force recommended that the legislation should be amended to reflect that the most important goal of mediation should be to arrive at custodial arrangements that are in the best interests of children. They have specifically indicated that, because there are many goals of mediation that are now included in that statute. One of them is the goal of arriving at agreements. One of them is the goal of reducing acrimony between the spouses. But those goals were seeming to supplant the goal of trying to work out a really appropriate custody arrangement and this proposed amendment was to make it clear that that should be the sole goal and the most important goal of mediation.

This report also spends a great deal of time discussing things like mediator bias and specifically refers to problems inherent in this closed-door process, as they call it, where the opportunity for exposing and/or offsetting biases through advocacy or appeal, which are available in litigation, is nonexistent. It discussed the many forms that mediator bias can take, which is of course very difficult to prove. It discussed specifically things like gender bias, social attitudes towards parenting and preference for one type of custody arrangement over another.

I had a lot of experience when I was still practising family law of clients coming to me with mediated agreements for review by lawyers, and even now at the Schlifer clinic in Toronto I hear lots of reports from our clients about their inability to communicate their concerns about their husbands' behaviours, which should indicate to any reasonable person that this person may not be an appropriate custodial parent. I have a case specifically of a client who brought to the attention of a mediator the fact that the husband was producing his own child pornography.

phy that all revolved around girls aged 10 to 12, and they were fighting for custody of their 12-year-old daughter. The mediator told her quite frankly that he did not think that had anything to do with the father's parenting ability.

I have also had clients talk about things like the alcoholism or drug abuse of fathers, and they are told by mediators that that is not necessarily relevant to parenting ability, and, of course—and this is something that has been most apparent in court proceedings—spousal abuse is generally not seen to be relevant to one's parenting ability. So those kinds of issues may not be able to be explored much if a mediator does not express any willingness to explore those things.

As a result—and I think this was a very important recommendation that the task force made—of those kinds of bias concerns, the task force recommended that a party be permitted to withdraw from the mediation or to challenge the mediator himself or herself without cause and without prejudice if the party feels there is some bias there and be free to choose another mediator to replace that person. It also goes on to make many other recommendations about mediation, one of the most important being that mediators should be precluded from making recommendations to the court on issues of custody because of the apparent biases and also because of the power and coerciveness that the mediator may actually take on to himself if he does have the ability to influence a court.

On domestic violence, the task force was absolutely unequivocal. It states that because of women's vulnerability mediation is absolutely inappropriate in spousal assault cases. Interestingly, it referred to a Canadian study on post-separation violence in which victims used adversarial processes to resolve disputes as compared to conciliatory processes. It found that 57 per cent of abused wives who were using conciliation suffered further abuse after separation as compared to 35 per cent of wives who used an adversarial process. That certainly seems to be consistent with our understanding of what processes seem to work best as a deterrent to wife assault generally. There seems to be increasing research in the United States that tells us that criminalization and prosecution of wife assault seems to be the best deterrent; therapeutic and counselling models do not appear to work as well. I think that is something we need to explore further.

In any event, I think that this whole process that the task force went through down in California and its consideration basically tells us

that it believes, at least, that there are big problems with the statutes that they implemented down there and with these systems as they are now operating. I can only assume that the inspiration behind the senate task force doing this work was an expression by people in the community that there were big problems that had to be reviewed. That was only six years after the passing of this legislation.

What underlies that report is clearly that joint custody and mandatory mediation are possibly perpetrating greater abuses on women and children than they are perpetrating anything of positive value. What is very, very much apparent is their belief that these systems were implemented prematurely without adequate research on their impact. Whether or not these systems in California were politically motivated we do not really know, but they are seeming to suggest that they have presented very simplistic solutions to what are difficult family law issues, and that they have jumped from the frying pan into the fire in that respect by going from litigation to mediation.

I want to address the Report of the Attorney General's Advisory Committee on Mediation in Family Law. To be honest with you, I have to be a little cautious about how I present my view of this report, only because I want to remain as respectful as possible to the process that the government went through in producing this report. But I cannot tell you the degree of anger that I and many of my colleagues in the women's community—who are service providers: providing service to women, not just battered women but to all women—felt when we read this report.

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I think the best that can be said about this report is that it demonstrates an incredible misunderstanding of the problems that women face in relationships with their husbands and in post-separation arrangements, whether it be mediation or litigation. It is an incredible oversimplification of the problems. It is an incredible oversimplification of what mediation is all about, and it is a very, very substantial trivialization of the issue of wife assault generally.

In some respects, this report kind of reminds me of a bigot who kind of acknowledges the fact that he is a bigot and expects some kind of congratulations because he said, "Look, I am a bigot, and I understand that I am a bigot, but I'm not going to deny that I'm a bigot." So people say, "Well, gee, this guy is kind of really together; he understands that he's a bigot," and

kind of congratulate him for the fact that he has acknowledged it. But at the same time, he is not saying that he is willing to examine his behaviour or change his behaviour, and more than likely he is going to continue to exercise his bigotry in the community. That is kind of how I feel about this report. It says: "Here are all the problems that women are going to face. We understand; we can acknowledge that mediation may not be a panacea, and we really have to spend a lot of time addressing those issues." But it really is not much more than lipservice to the concerns that women have expressed, and I say that because to me the proof of that is in the pudding, and the pudding is this report itself.

The women's directorate, as you know, is a part of this committee. The purpose of the women's directorate, which you also know, is to advise the government on issues respecting women. You may not know that it has very, very close links with, broadly speaking, the women's community—that is, all service providers, non-profit agencies and other agencies that provide services to women in a variety of areas—and it does a very good job of consulting with those of us in the community to find out what current problems are with women so that it can relay that kind of information to the government when the government is deciding what direction it is going to take, for instance, on the criminalization of wife assault or what kind of funding structure it should use for the funding of battered women's shelters, etc. The Ontario Women's Directorate does a lot of work in ensuring that the issues as we in the community understand them are taken to the government.

Having said all that, I have to wonder why women's concerns, as expressed by the women's directorate, are not incorporated into this report except in chapter 4, which is written by Michael Cochrane, and except in respect to domestic violence, which is treated in a very bad and offensive way by this report. The women's directorate dissented on 6 of the 10 recommendations that are made with respect to wife assault. Now, if the women's directorate, representing those of us in the community, representing the population of women out there generally, is dissenting on six of the 10 recommendations, I think there is a pretty big problem as far as how seriously those concerns were taken by the members of this committee or by the Attorney General.

Again, something we are frequently faced with is that the view of women and women's concerns are somehow considered to be a

minority view of the world. We are somehow considered to be the other voice instead of another voice in a community of voices and in a community of interests. This report demonstrates that same disregard for women, that same isolation and marginalization of women that we are confronted with in lots of respects. Most illustrative is the treatment of battered women, and I am sure that the Ontario Association of Interval and Transition Houses went into this this morning. I do not want to repeat too much about that.

But the women's directorate brought to the attention of this committee some of the concerns with the formula that it is proposing for screening of possible spousal assault situations—basically the report recommends that cases not be mediated if wife assault is identified; second, if the violence has created a power imbalance; and third, if the violence has rendered the woman incapable of negotiating with her spouse. Anyone with experience in domestic assault knows that that is a totally inappropriate approach; it will not work and it is very offensive to women.

The women's directorate has tried to explain both to the committee and in this report why that approach is not advisable. They explained simply that, for instance, women do not disclose domestic violence. We know that from our history with domestic violence. We know from trying to get medical information and information from the police that very seldom do women ever disclose that their medical or emotional problems are a result of domestic violence. The women's directorate says that even when women are asked, they disclose only 25 per cent of the cases. I know that to be a fact.

I used to have many of my referrals when I was practising family law from battered women's shelters. When those clients would come to my office and I would ask them to describe the violence in their relationships, they would tell me there was no violence in their relationships. They were coming from battered women's shelters. They would then of course go on to describe the beatings and emotional and physical abuse, but they would not necessarily call it violence.

The women's directorate also tried to explain that domestic violence is by definition a power imbalance, by definition a cause of power imbalance and prima facie evidence of power imbalance. The fact that there should be any inquiry as to whether or not there is a power imbalance is pretty offensive. It explains the potential impact on women who are found to be unable to negotiate. What does it mean to a

woman if a mediator finds that she cannot even negotiate when she at the same time is making a custody claim to her children in a court? How is she going to be viewed by a court if she is not even together enough or emotionally stable enough to sit down in a room with her husband with a mediator between them and talk about their problems?

In a larger sense, I cannot understand why there is no consideration of whether or not a batterer is appropriate for mediation here. That should be, to me, the focus of any inquiry into whether or not mediation is appropriate in spousal assault. If there has to be an inquiry, which I think is problematic in itself, why is there not even a suggestion that perhaps a violent man is not an appropriate candidate to mediate?

The report's attention to issues of power imbalances: The report basically says, as we always hear from mediators, that they must be sensitive to issues of power imbalance, they must be trained on issues of power imbalances and that they must attempt to reverse power imbalances where they are found to exist. Assuming that mediators' values were such that they believed that power imbalances existed or should be redressed, how do they do it? How do mediators address the power imbalance that may have existed in five, 10 or 15 years of a marriage? I am not talking here about spousal assault situations; I am talking about many marriages.

Where power imbalances exist, how does a mediator address that in three, four, five, 10 or 15 one-hour sessions, 15 hours of negotiating between a husband and wife who have been married for 15 years and who have established a relationship and a means of communicating with each other?

How do we address the whole problem of mediator bias? All the training in the world does not address bias. We know that from the litigation problem. We know that from judicial training. We have highly skilled mental health professionals, psychiatrists, psychologists, social workers and lawyers, all of whom we have demonstrated have sexist biases that we have had to deal with in the family law system for years. We are now going to have yet another group of professionals with the same kinds of biases being involved as players in the system.

The bottom line is that we are being asked to take a lot on faith; we are being asked that these problems be addressed and maybe, somehow, through an extensive process of education and training, those kinds of things can be addressed. But we certainly need to explore why these biases

exist and how they are played out. We could take the litigation system right now, we could look at custody assessments being done right now, the power that custody assessors have and the kinds of biases they bring to a situation; we could assess that right now to figure out whether or not we are even able to address the issue of bias.

I see women every week in my office who are coming to me because they are involved in custody assessments in which they are feeling very much biased against by the psychiatrist and they do not know how to get around that. As you know, most family lawyers will tell you now that judges pretty well rubber-stamp the recommendations of the custody assessor.

This report does not deal with issues of the adverse economic and emotional impact of mediation on families. What this report probably should have recommended, if it recommended anything instead of the 50 recommendations it did make, was that we need a lot more research in this area. We cannot simply accept, although we would probably all like to, the representations made by mediators that they are sensitive to these issues.

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I do have to take objection to mediators who say, "We would never dream of mediating wife assault. We know all about power imbalances. We know all about bias and we know how to compensate for those things." That is simply not the case. I have addressed associations of mediators, I have talked to many mediators both when I was practising and now, and they do think they can mediate wife assault. I have had a mediator even tell me that she thought she could use mediation to circumvent the criminal justice system; that she might be able to convince a husband and a wife who were involved in the criminal justice system, the husband having been charged with assault, that maybe that was the most appropriate way of dealing with domestic violence and that maybe they could deal with it in mediation instead. So what mediators say publicly and what they say privately are two different things.

Mediators have increasingly taken the position that they can mediate anything, and I think this report is an indication of that. This report, after all, was developed by mediators. Of the 12 people who sat on this report, eight of them are mediators or strong mediation proponents, at least eight that I can see; actually the one I was not sure of was confirmed by Dr Irving a few moments ago. He is also a mediator.

I just want to say one other thing and that is that family law is not a throw-away area of law. I think we are very, very much approaching it in that way: that it is not a really serious area of law, it is not like criminal law, it is not like corporate-commercial law, it is not like some of these high public policy areas of law like environmental law, for instance, but is something less substantial. That is just not the case.

Family law impacts on more people in this province than any other area of law and it has enormous public policy implications in terms of how we view relationships, families and the status of women relating to issues of economic status. It is probably the most significant public policy area of law of any. I think it is very ill-advised to view it as a kind of guinea-pig for some experiment in dispute resolution.

I want to close by saying that mediation is the newest of a series of family law reforms that have been approached by this government, the first one of course having been support enforcement legislation three years ago, followed by access enforcement legislation and now mediation. We are in a situation where we know that support enforcement legislation is not working. We know that we are nine, 10, 11 months behind in being able to enforce support on behalf of women and children. Some research is being done at the Metropolitan Toronto council level which seems to indicate that the system is costing more than it is actually recovering in support payments. It is actually working worse than the old system of using lawyers to enforce support. That is a system that needs to be examined and it needs to be improved in the immediate future.

We also are in a situation where we have no ability to implement supervised access any more. We do not have supervised access centres in this province—

Mr Jackson: Publicly funded.

Ms Fassel: Publicly funded. Yes.

Mr Jackson: We have a few of them, but they are not publicly funded and it is hard to get access to them. Sorry for interrupting.

Ms Fassel: Right.

And we have access enforcement legislation. It is not being used yet. It has not been proclaimed yet. It will apparently be proclaimed in the spring. But you know the controversy surrounding that legislation and I am sure you are aware of the fact that many people made lots of representations to the government on the potential economic impact and other adverse impacts that that legislation was going to have on women and children. That has not been used and we do

not yet know what impact that is going to have on women and children.

With all these things untested, untried and unevaluated, yet we are now being told that we should move into another whole area of law reform, mediation, which is equally unsubstantiated by research, equally unresearched. We tried to convince the government months and months ago to research the issue of access and enforcement before implementing a new law. We lost that one. We are now trying to convince the government that it should be taking a very careful look, through appropriate research, at mediation. Government so far has seemed unwilling to do that, but we are repeating, or possibly repeating, mistake upon mistake. At some point we have got to stop and not repeat the mistakes that have been made elsewhere. There are a lot of good models out there to explore and to examine, but that is the kind of thing we need to be putting our energies into and not just willy-nilly getting into yet another reform movement. That is it.

The Chair: I have a couple of questions. I am interested in the dynamics of mediation in the family law situation as it exists in Ontario today. We had two witnesses this morning from the Canadian Bar Association, Jennifer Treloar and Carole Curtis, and they both indicated that mediation is not new in family law. It has existed for about 10 years, as they indicated, and they indicated that it was appropriate in a restricted number of cases. In fact, one of them indicated that she had 10 clients who were in the process at this particular point in time.

But I want to relate that little bit of background to your comment, where you indicated where there is mediation, there is almost always joint custody, and it was kind of sad, in a way, that you did not approve of that particular process.

We also heard this morning that usually in the case of mediation—in fact, it is required—there is an element of independent legal advice. What happens in a dynamic where you find the two spouses in the mediation process because of their own initiative or because they were referred there by one or both lawyers? What is the nature of the independent advice, and would that independent legal advice not address and canvass, particularly the woman, as to whether or not she was getting a fair shake in the process? What is the nature and the quality of the independent legal advice that a woman would be getting from a qualified lawyer in the mediation process?

Ms Fassel: If a client were to come to me, as many do now who are just separating from their husbands and considering how to go about the

separation, considering mediation, for instance—say she was coming to me before she gets into mediation. Then I would likely advise on what my concerns are about mediation and what to kind of be aware of, what they should look for, aside from issues of how to protect their legal interests, their rights to support, their rights of property division, etc. I would probably talk to them about how to present themselves to a mediator, how to make their interests known to the mediator, how to make their views known to a mediator, all of those things that generally women are not very good at doing. If a client came to me having already been involved in mediation, wanting an independent review of a contract, for instance, that is something a little bit different.

One of my concerns about mediation has arisen from my experience when I was still practising of women coming with these agreements and saying: "Okay, my husband and I have now been involved for six months with a mediator. We have this agreement and we have been sent off to lawyers to get you to review them for us." I would look at that agreement and say: "I can't recommend this agreement to you. It's blatantly unfair. I think you're giving up too many of your legal rights."

The usual response to that from women was: "But I can't go back to the mediation now. I can't go back to the mediator now and say that I don't agree with this. We have put so much work, and he's going to think I'm unreasonable and he's going to think that I'm just greedy or that I'm vindictive," or whatever. "I can't go back to that mediator now and tell him that I'm not happy with this agreement."

The Chair: Is it usually the woman who is the loser, or on the other side, where you have the husband going to his independent counsel, saying: "My God, you've given up too much property. You should have gone for more access, etc"? Is the dissatisfaction, or is the independent legal advice that is given after the mediation process, equally as negative in terms of occasions to the husband as to the woman?

1610

Ms Fassel: You are going to hear different opinions on that from different people, obviously. My understanding is that research in the United States on client contentment with mediation indicates that women are less content with the results of mediation than men are. I also cannot underscore enough the point that one of the lobbies for mediation are people involved in father's rights, which would seem to indicate that

they at least have a perception that they are going to fare better in mediation than they do in litigation. Whether they are right or wrong, I do not know. I would suspect that they are right. At least, they believe that they are right.

I think what we will generally tend to see—and there has not been this research in Canada; that is one of our problems with it—but my own information, the anecdotal information I have from my own practice, would seem to be that women give up a lot more in mediation than they would otherwise if they had lawyers representing them.

The Chair: I have practised law for 19 years, not in the area of family law but in a general practice where some of my partners were practising family law. Quite frankly, I have had many, many occasions—and you described some anecdotal experiences with mediators in terms of your experiences with them—where I have had clients come to me who have been in the process of being serviced by another lawyer in a matrimonial situation, and it has become apparent to me in a significant number of those cases that the clients, in some cases the woman and in some cases the man, were being poorly served by that lawyer, that it was being settled when it should have been litigated, and vice versa. It works both ways.

It is very easy to sit back and pick out the weaknesses in a system, in the adversarial litigation system as well as in the mediation system. I guess one of the things we are trying to do here as a committee is look at the pluses and the negatives in both systems and try to recommend something to the Legislature that is generally good, and is not necessarily to criticize one system or the other but to try to take the best out of both systems.

Ms Fassel: But we are kind of—

The Chair: I am leading up to a question. In terms of the mediation process, would you take any level of comfort if there were some sort of provincial law which required independent legal advice before the mediation process started? Would that give you any level of comfort?

Ms Fassel: It would give me some large measure of comfort, yes. Not just a one-hour consultation with a lawyer before they get into mediation, but lawyers need to be involved throughout mediation, in every step of the process, because mediators, aside from the problems that I addressed, the problems of bias, etc, also may not have any kind of understanding of the law.

I also do have to tell you that I attended a conference on mediation a few years ago in which a mediator from Wisconsin was presenting, and I asked him at one point in the question period if it mattered to him that an agreement a couple had mediated was unfair to one party. His response to me was if it was what they wanted, that would be fine. So the fairness or lack of fairness in these agreements did not seem to be a high priority to him. I think lawyers do need to be involved throughout, and I think people do have to be advised as to the limitations of mediation at the start, before they get involved.

Those of us who have expressed concerns with mediation are really in a kind of position of having to respond to something that is being suggested as a system superior to litigation. We are responding to the claims of mediation to be superior in all of these respects to the adversarial system. We are, in a sense, challenging those people who are saying those things to indicate—and if they can indicate that it is a better system, then we should definitely go with it, but that evidence just does not exist.

I also want to say that to be concerned about mediation is not to be wholeheartedly committed to the adversarial process. In most respects when I do public speaking, I go out there and talk about how horrible the family law system is on women. It is also not a perfect system for women, and it is definitely not a perfect system for children. There are problems there, but to throw out one system for an untested and probably worse system is very unwise. At least we do have procedural safeguards in litigation. At least we do have the ability to see what is happening in litigation, which we do not have in mediation.

I also should add, and I do not mean to sound like too much of a proponent of the legal system as it is now, but at least the reforms that have come into the legal system have been a result of litigation, have been the efforts of lawyers and advocates within that system who have identified the abuses, who have identified the discrimination and who have advocated in either a legal context or a political context for reforms of that system. It has been an open, obvious system that we could address. I do not know how we are going to address this in mediation when what is actually happening is so obscure.

The Chair: This morning Ms Treloar and Ms Curtis indicated that there is a place for mediation, although they feel that a lot of people think it is a panacea. As I indicated, Ms Curtis indicated that in fact she has 10 clients who are in the process of mediation, and she agrees that they

should be in the process of mediation in those particular cases. In your opinion, first of all, do you think that there is a place for mediation in the process, and if so, to what extent and in what types of cases or situations?

Ms Fassel: I recently referred a client who came to see me at the clinic to a mediator. I recommended mediation to her. She is a doctor, her husband is a lawyer. She, from what I could see of her, was certainly assertive, aggressive and more than able to represent her own interests with, of course, reference to a lawyer on the more specific aspects. I did not have any concern about her ability to engage in mediation in a positive way or in a useful way. I think there is place for mediation.

The Chair: But why would you refer that one to mediation as opposed to litigate it or settle it in the legal process?

Ms Fassel: Because the issues that she and her husband were caught up on were pretty insignificant. I could have referred her to a lawyer. She, in fact, had already been through some part of the legal system, and she and her husband had pretty well determined all the issues of property and support. They were really dealing with an issue of whether or not the child should be taken out of the jurisdiction on vacations. That was not an issue that I thought warranted any kind of a legal application; I thought they could probably resolve it. But again, she was certainly articulate and certainly aggressive and able to represent her views, and also able to know when she should go back to the legal process.

I think there is a place for mediation; there always has been a place for mediation. People have always used mediation without the coerciveness of a law that tells them they have to do it or they have to be introduced to it. People have always used that. People have always used their own negotiating skills to determine agreements between them when they separate. That is not a new concept. What is new about it is a sense that it is appropriate for everybody, that all people in Ontario should be mediating, that mediation has a place for all people of Ontario. That is the difficult concept of mediation.

The Chair: In the mediation that takes place now in Ontario, just ballparking a percentage, how many would be with the help of independent legal advisers, as opposed to going to a mediator, going six or eight months and then bringing an agreement in principle to the legal advisers to reduce to a legal document? How many cases that are in mediation would have independent legal advice throughout the process?

Ms Fassel: I cannot answer that.

The Chair: Would it be less than 50 per cent or more than 50 per cent? Could you ballpark it?

Ms Fassel: I do not even know how we determine that. I do not know how we have access to those people who are mediating who never do come into contact with the legal system or with lawyers. I do not know the public assessment.

The Chair: Certainly those in the legal profession should have some sense of it because they end up drafting the documents, so they would know at what point legal advice would have been intervening in the situation.

Ms Fassel: I do not know how we arrive at what percentage, though, of all people separating are using the services of mediation.

The Chair: But do you think that would be a significant area of research? If we could establish that most of the mediations that are going on in the family law area are with independent legal advice, would that be a significant factor to know?

Ms Fassel: Yes, I think it would. I would like to know who is doing it, under what circumstances they are doing it, what couples are doing it, under what circumstances and how lawyers are involved, if they are involved. I think we could get that information from the family law bar if we researched it.

Mr Jackson: Thank you for an excellent oral presentation. I know this is not the first time you have been before this committee. You did express some concerns about whether or not you were going over old territory, but it was in the standing committee on social development of the Legislature that was dealing with the aforementioned legislation. It is just recently that the standing committee on administration of justice has been dealing with matters with respect to family law, so your presentation was helpful for those members who have not sat on both committees. I have had that privilege and certainly appreciate the message you brought, the cautionary notes.

1620

It struck me that we have an unusual situation developing when you made reference to those three specific pieces of legislation, the one that dealt with enforcement of support orders, which has been moved from the courts into more of an administrative function; then we moved, second, to custody and access, which moved out of an informal situation but more into the courts, and

now we have the family law mediation, which takes the process out of courts.

It seems to me that if we were sort of doing a Ben Franklin checklist, it would appear that women have been badly served, or could become badly served, by two pieces of legislation which separate them from courts. I guess all three impact them in a negative way if you consider that in the area of access a man has immediate remedies to the courts for even trivial matters and the onus of proof is on the woman to explain why access was not available at that time. It seems to me that we have not done sufficient research in all three areas to proceed any further, but each in and of itself though has created problems that are interrelated, and we are not resolving them. Would you like to comment more specifically on that?

Ms Fassel: As a kind of overriding statement, I think that it is not an accident that the people who are rethinking these things in the United States are looking at them in terms of the economic impact on women and children. We know even from Statistics Canada data that women's and children's standard of living is reduced drastically on divorce of the spouses. The major problem for women in this province today is their poverty. Women are sliding back, not making any kinds of gains.

A family law system cannot be the only form in which we try to redress that situation, but it certainly is a major one. It is women's poverty—it is not access disputes, it is not the fact that there are not mediation services—that is the biggest problem. That is why the incredible amount of research and lobbying was done to try to get support enforcement legislation implemented here in an effective way. Unfortunately, we did not do it as well as we should have done it. We used a model that was probably doomed to failure because it is not an appropriate model for a province of eight million people.

Yes, what we can see from what is happening with families now and the failure of the support enforcement system are concerns about what is going to happen with the inclination, I guess it would be, what we fear will be the inclination of women just to give up on support altogether rather than go through the hassle of 100 access enforcement applications being brought against them when that legislation starts to be used, and if the research in the United States is right, the inclination for women to trade off financial security in mediation for assurances that they will retain custody of their children.

Without exception, I do not think I have ever had a female client who has ever come to me and not said: "I don't really care about the financial stuff or the property stuff. I want assurances I am going to be able to keep my children." They are not really saying they do not care about those things. What they are really saying is: "If push comes to shove and if I have to make a choice, what I want to be assured of is I am going to keep my kids, and I don't really care about the property or the support. I can make my own way." Women consequently are falling farther and farther back.

To be honest with you, I am even finding myself now saying to women who are confronted with fathers who are becoming increasingly the father's-rights-type guys, who are becoming increasingly more aggressive: "Maybe you should just consider if you really think you're going to put an end to this. If you really think you can get this guy out of your life once and for all by just not pursuing support enforcement, then why don't you just think about forgetting it."

That is not the kind of advice we should be giving clients, except that it is reality. Women who say, "For the \$125-a-month support order that I am not collecting anyway, if I am going to be confronted with the fact that every time my husband comes to exercise access to his children he is being abusive or have other associated problems with access, I would just as soon give up the damned money and have some peace in my life for myself and my children."

That seems to be the reason, and it always was; this is not new. Bargaining off financial assets for custody was always done. I cannot imagine a lawyer who did not advise a woman client who walked in her door that she could expect a custody application just until the financial stuff was resolved. I consistently say to my clients, "Do you expect your husband to claim custody?" and they would consistently say, "No," and I would consistently say—

Mr Jackson: "Wait, it's coming."

Ms Fassel: —"Wait until you've made a financial claim." Those are not serious custody claims.

Mr Jackson: Could I talk about another economic argument, and that is the one that both Michael Cochrane and Shin Imai from the ministry advanced: that generally they felt there would be some saving to the system, saving meaning reduced loads on our court system, reduced legal expenses? They enumerated four or five items around the concept that society would benefit from the economic argument.

Yet when I was able to ask them questions, I went into detail with the law reform group and its study, specific statistics, data, which would bear that out, and in each and every response there was no data whatsoever to support the notion that we could look at mediation as a means of saving taxpayers' money, even if we were prepared to flirt with the issues of better or less or more amounts of justice. The public is willing to look at those arguments.

You have introduced the notion that in fact some of these programs end up being more costly—more costly not only to the court system, but maybe more generally more of a cost to society generally. I know you have made cogent arguments about the lack of empirical data and the amount of research. Even the chairman's questions, which begged the need for additional research, demonstrate that we really do not have much of that and yet we are proceeding with this. Could you tell us more about this economic argument of what really is the tradeoff here?

Ms Fassel: Obviously in my comments of a few moments ago I think is what is being lost to try to save some money in the administration of the court system, for instance. If you remember a few years back when the Attorney General was talking about the benefits of implementing the support enforcement process, he talked in terms of the hundreds of millions of dollars that are annually paid out to women and children in welfare payments and that there would be a substantial cost savings to the province if we could actually start effectively enforcing support orders. Well, that has never happened.

We do know that the system seems at least to be costing more to administer than we are actually getting back. So we still have the welfare payments because women are not getting support, but we have got the heavy-duty additional administrative costs of this support enforcement process on top of it. Even if we had an effectively operating mediation service in the courts or elsewhere in this province, if the findings of some of these organizations in the United States are accurate, the tradeoff is to women's economic security. We may be saving—may be saving, and that is not even proven—some money in terms of the administration of the courts, but that is going to be at a direct cost to women and children who are going to be using this alternative system and who are going to be trading off a lot of their economic security in it. So, "Who is going to pay for the system?" is, I guess, the right way of asking whether or not this is a good or bad

system. Who pays for it are the people who are least able to pay: the poor people.

Mr Jackson: So you are not satisfied that in the elements of justice we would be moving in the right direction. You are not satisfied in the areas of economics that we have sufficient data to suggest that we might be moving in this direction for good, sound economic reasons either.

Ms Fassel: That is right.

Mr Jackson: So really in your view there is no compelling reason for us to be getting into this.

Ms Fassel: No, I do not think there is, aside from the fact that I think lawyers are doing a relatively good job of negotiating settlements on behalf of their clients as well. But I guess really the point is that we are not wading into new waters here. These projects have been in existence in the United States. If we want to look at models, there are many down there that we can explore further. If we want to do this kind of research there are lots of projects across the United States that have ample evidence, ample research, ample statistical data collection systems, that we can look at comprehensively and find out what is going wrong down there.

1630

Mr Jackson: It is interesting you should say that. I took great exception to the fact that one of the committees of the Ontario Legislature went to New Brunswick to study opposition-free legislatures, which fascinated me, yet we cannot muster the resources for us to visit in California those people who have now uncovered all of this resource and research material in order for the committee to do a more adequate job of coming to an appropriate conclusion.

If I can just finish with one question, this is the third time that you have presented your concerns with respect to this area, to this Legislature in the last three years, to my knowledge. I have been present for each of those presentations, but what strikes me is that you have introduced an interesting notion. I am going to pick up on it because it seems that we have not had legislation that heeded your warnings, and I regret that. We may do that again this time. To the extent that you might influence some amendments, I would like you to focus on the points you made about the fact that violent perpetrators should be denied access to mediation. I understand the point you are making there, but in terms of how we write recommendations, that is very important. Since this is a majority government committee, not always do minority reports carry a certain weight and it would be hopeful that we might agree as a

committee that this is a recommendation we might embrace. Could you comment more directly on that?

Ms Fassel: I do not know if I really can comment any more directly on that. I think that there is a lot of psychological research out there that would certainly be useful for us to explore as a way of determining the appropriateness of a batterer for mediation. There is certainly a lot of research out there that is being done by people like Peter Jaffe, whom I understand you have either heard from or are going to hear from, about the impact of battering, spousal abuse, on children. If mediation on the one hand claims to be in the best interests of children but it is incorporating into its process men who are batterers, it would seem to be a kind of inconsistent value, really. What we are gaining with one we are offsetting with the other. It does not seem to be very wise to be doing that.

I do not know why there is a reluctance to spend some time researching this stuff. We do have good stuff available. There is good psychological/sociological, research available out there that we can utilize in Canada as well as in the United States. If there is any doubt in anyone's mind that mediation may only be appropriate in some situations and not others, let's look at this research. There is one major piece of research in California that is the only research that has looked at joint custody, for instance, extensively, and it raises some serious concerns about the utility of joint custody.

Let's put it all together and let's find out what this research is saying and why it is saying that. There is a lot of movement, not just in this area, to looking at the issue of wife assault a little bit differently than we have in the last five years in this province. There is a lot of talk about decriminalizing wife assault, which is a frightening concept. In the United States, mediation is being used as an alternative to criminal prosecution in wife assault cases.

There has a bit a little bit of consideration of that by the Department of Justice here in Canada. All of those are kind of frightening trends. You have to find out what is the political motivation behind all of this. If the motivation is to reduce the overall cost of the administration of the courts, or it is some politically motivated—I do not really know; I suspect it is, of course, all of those things, but we have to look at why that is happening and why it is happening as quickly as it is.

You have only basically had about 15 years of positive family law reform that was seen to

redress the traditional discrimination against women and children in the system. It has not been a long history and already we have substantial research that seems to be turning back the clock.

Mr Jackson: I could not help but notice your comment about decriminalizing wife assault being a frightening concept, when the concept of wife assault is not in our Criminal Code at all.

Ms Fassel: That is right.

Mr Jackson: It is hard to decriminalize something that is not in our code. Assault is assault whether you go next door and punch your neighbour's wife or you come into your own home and punch your own wife. That is assault. It strikes me that the distinction is in the minds of the courts and not necessarily in—

Ms Fassel: In a criminal law bar, unfortunately.

Mr Jackson: Exactly. The concept of decriminalizing wife assault is a rather frightening one and certainly is to be fought. Thank you.

The Chair: Just by way of information on some of the questions and answers, the committee and perhaps the witness should be aware of the fact that on Monday we are going to have from the American Bar Association, from the California jurisdiction, Joel Shawn, who is the co-chair of the family law section, mediation and arbitration committee. We are going to have the opportunity to hear a presentation on how the system works or does not work in California and we certainly will have an opportunity to question him on that.

The other point: a number of people have described the shortfalls in alternative dispute resolution in a number of areas of law, including family law, and that is one reason why this particular committee is doing an inquiry into it, because we are going to be recommending some government policy or policies to the Legislature and the Attorney General, and hopefully something productive will come out of the process.

I believe, Mr Smith, you have a question.

Mr D. W. Smith: I will try to keep mine short, not political at all, but just to clarify a point. You said that the grass roots are concerned about mediation. When you say "grass roots," are you really meaning poor women?

Ms Fassel: No, no, I did not mean that. I meant people who are working in the community with women and families where there has been domestic violence or other economic or social problems. We not only assist them within the legal system, for instance; we also work as

advocates in the housing area and the welfare area, so there is a variety. But I meant really the service providers that have expertise in all of these areas.

Mr D. W. Smith: Okay. Do you think it is time we had a woman Attorney General? Just listening to your comments, I found them very interesting, and I may have a better understanding of family life.

Ms Fassel: We have an Ontario women's directorate that has a lot of very talented women, to the credit of the government that decided to put that agency together. I wish they would use it better and use it more. The women's directorate is, I think, very much ignored by the government in a lot of essential respects. They do not just deal in domestic violence; you know they deal in every area, and they do very, very good work and they have access to a lot of information. I would be surprised if the Attorney General knows how much information the Ontario women's directorate has put together on mediation around the world.

They have got reams of information and studies and research. I would be surprised if Michael Cochrane has accessed that information in preparing this report. So the women's directorate is a very good tool and it is a very good place for us to do the kind of assessment we need to do.

The minister responsible for women's issues also seems to be quite supportive of women's issues and quite understanding, particularly of areas like domestic violence, so I think it is encouraging to us to see that a woman like her is in that position.

I do not necessarily think that a female Attorney General is going to be the answer any more than female police officers are the answer or female judges are the answer to some of the problems that existed there.

Mr D. W. Smith: It was interesting. One of the women who made a presentation, I believe it was from BC, thought mediation would take place more often if there were more women lawyers, or at least that was the way the question was asked.

Ms Fassel: That may very well be the case if it was controlled. My understanding is that some of the original proponents of mediation in the United States were feminists, who believed that mediation was a more humane system or process that could incorporate feminist principles of interaction. They have had to kind of jump back from that after 10 years or 15 years of experience with it, and have now realized that they were just

simply wrong with a lot of this stuff. It has not been implemented in the way that we had hoped and we have not been to have the control over it that we really feel like we need.

I would also just like to add that I know you are going to be considering a lot of different recommendations and I must, as a member of the steering committee of the Family Law Reform Coalition, indicate very strongly that we really do, more than anything, want a process of public consultation on these issues. This report was not widely distributed in the community. I understand that Mr Cochrane has indicated that 1,000 copies of this report have gone out around the world. Well, I know for a fact that not more than a few dozen have gone out within the province of Ontario, and I know for a fact that there are only two women's organizations that received copies of this report, and they were the Schlifer clinic and OAITH.

One of the reasons that this coalition got together was because of our frustration over not being able to consult with the government or provide input into government policy directives in this area. Probably one of the most important things from the coalition's point of view would be that the government commit itself to public consultation on these issues before it makes any further movement in this area.

The Chair: I do not see any further questions from the members of the committee, so on behalf of the committee members, Mary Lou Fassel from the Barbra Schlifer Commemorative Clinic, I want to thank you for your presentation and for answering our questions. I am sure they will be taken into account in the final report to the Legislature. Thank you again. The committee is adjourned until 10 am tomorrow.

The committee adjourned, at 1641.

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Legislative Assembly of Ontario

Standing Committee on Administration of Justice
Alternative Dispute Resolution

Second Session, 34th Parliament
Thursday 22 February 1990



Speaker: Honourable Hugh A. Edighoffer
Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday 22 February 1990

The committee met at 1016 in room 151.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: Good morning. The standing committee on administration of justice is in the eighth day of a study into alternative dispute resolution in Ontario.

COMMUNITY JUSTICE INITIATIVES OF WATERLOO REGION

The Chair: The first witness this morning is Gordon Husk, who is co-ordinator, community mediation services, at Community Justice Initiatives of Waterloo Region. I will ask Mr Husk to make a presentation and then afterwards I am sure he will be available for questions and answers. Mr Husk, please proceed.

Mr Husk: First of all, I would really like to thank you for having our organization here. I want to apologize for a number of things, and first of all is that the co-worker who was going to be with me, who is the victim-offender reconciliation program mediator, is unable to attend today. I also want to, I guess, apologize—this is not a great way to start—and to explain to you also that, as somebody who works two days a week on the project, I did not prepare a lot of material for you.

I have presented you with a yellow sheet on the Community Justice Initiatives of Waterloo Region, outlining for you the purpose of the organization, discussing what community mediation services are about and looking at the paradigms of justice, old and new. Also, I have presented you, in the last three pages, with a proposal that we made to the Ontario Attorney General.

I also want to explain to you that I am not an expert in mediation and I am not an expert in VORP. For the last nine years I have been a John Howard Society worker in Newfoundland and have been working with federal prisoners. I have been looking at people and working with them and their families after the damage is done, sort of doing the sweeping up, so I was really excited in terms of coming to Ontario and getting a chance to work with Community Justice Initiatives, which is well known, both nationally and

internationally, for some of the work that it has done.

I want to share with you a situation that I heard about when I was at a violence conference that was organized by the John Howard Society of Canada. About three years ago I was at a fairly large conference. At the time I was listening to the radio and there was an announcement on about Hull on the news. One of the items was that the police had been called into a house the night before over in Hull. Two men had gotten into a fight. Around 11 o'clock the police came in, broke up the fight, separated them and then they went on their way. Things apparently had been solved. Around three o'clock in the morning the thing had erupted again. They had gotten into a fight. One man stabbed the other man and killed him.

I was listening to this and in many ways it was very, I guess, symptomatic of our society, especially when they went on to tell about the fact that apparently the guys were fighting over—and this had been an ongoing dispute for a number of years—a van being parked in the driveway or some sort of issue in the driveway. I thought, "God, as a society don't we have some sort of responsibility, or could we not have prevented the damage that had happened?" Now we had involved two families at the very minimum. We had both the victim's and the offender's families, and regardless of what happened to the offender, whether we sent him away for \$25,000 to \$50,000 a year or we sent him to a psychiatric hospital for \$60,000 a year, regardless of the economic layout, I wondered if in some ways we could have prevented that.

Generally speaking, what I was faced with over my last nine years in working with the John Howard Society was the darker side, sort of roaming around our federal prisons, seeing the damage that we do and not being all that surprised in some ways when the people come out in the street and do more damage to our society, which is all too frequently in the news here in southern Ontario.

Community Justice Initiatives really excited me because it was a philosophically bound, ideologically bound organization that some of us emulated in Newfoundland and actually started a branch there. It is an organization that is devoted

to restorative justice. A lot of groups claim to do restorative justice, but Community Justice Initiatives here in Ontario tries to stay with that.

Essentially what that means is that it defines crime in terms of damage done in our community and what it tries to do is restore the situation to before the damage was done. To give you a little better idea of that, and I will try not to go on and talk too much this morning, "Paradigms of Justice Old and New," which is on the second page, on the flip side, would give you some ideas. I am not going to go through all those, but the first one, as an example, is that in the old paradigm, or retributive justice model, which is what we in North America essentially follow, crime is defined as a violation of the state. So when we have victims claiming more rights, what victims fail to recognize a lot of times is that crime itself is committed against the Queen or against the state and not against the victim. The victim merely corroborates the fact that there has been a crime committed.

The new paradigm, or a new shift, is that we look at crime as being defined as a violation of one person by another. That is a really important thing. That means that essentially when we look at it in that way we look at the three essential components in any crime or any violation: the victims, the offenders and the community. Why is that really important? It is important to us because what it can do is a lot of times when we resolve disputes or hurts or pains, rather than ripping and shredding the two parties apart, what we essentially try to do is bind or repair the wound. What we do is try to develop a sense of wellbeing within the community itself.

That is a bit of philosophical backdrop and I would like to move on and tell you a little bit about the programs at CJI. CJI itself developed out of programs of the Mennonites in the early 1970s and 1974. There was a probation officer hired by your government who was also a Mennonite who decided to try to put into action some of the things that their church and other churches had been preaching. Essentially it was a case where a couple of young fellows, 18 and 19 years old, had gone on a bit of a rampage in southern Ontario, broken into houses and businesses. They went to the judge and said, "In terms of assessing the amount of damage, we'd like to bring the victim and the offender together." They were very surprised in that the judge said, "Okay, we'll put that as one of the conditions before sentencing." From that has evolved the victim-offender reconciliation project, which is now international in that it has

been emulated across Canada, through the United States and in Europe. From that also developed over the years community mediation services, the program that I am co-ordinating. The program that I do brings together neighbourhood disputes, family disputes, etc, and tries to resolve those.

As time went on with CJI, it came into the area of looking at victims and offenders, got into the area of sexual abuse. CJI has developed, over the last five or six years, programs to help victims, offenders and also other people who are involved, like relations of both victims and offenders.

Trying to stay within the restorative model has not been very easy because the natural inclination is that this kind of work should be done by professionals where CJI has really developed programs that say that we as communities and we as organizations can solve our own problems. If two neighbours are having a dispute, they can resolve that dispute and we can teach them how to do it.

I want to tell you a little bit about victim mediation services. Right now, what we do is that we have broken new ground in terms of neighbourhood disputes. In a very typical week I get a call from somebody who is having a fight with a next-door neighbour about a leaning fence or a fence which is on somebody else's property. What we do is we have a number of volunteers in the community. I assess the situation in terms of talking to both the complainant—if there has been a bylaw infraction, then we handle that through the usual sorts of means or through the courts. If it is not a bylaw infraction, which many are not, and it is in the grey area, then it is referred to us by the city of Waterloo, and also the city of Kitchener. We step in and we send out volunteers we have trained. They go out and they meet with both parties. They meet with both neighbours and they see if they can work out some sort of resolution.

I want you to be very clear in terms of understanding mediation. Mediation is not arbitration. It is a form of negotiation, but what it does is bring parties together and it is the parties themselves working out a dispute. The parties resolve the dispute. The mediator's skills are strictly in terms of communication skills and being able really to keep the discussion going and trying to reach underneath some of the presenting items sometimes and helping them. There may be some other ongoing issues in the family or in the neighbours.

Another thing we are doing is in the area of families. We are helping families who are separating or divorcing. We bring them together also. Rather than paying \$280 an hour to pay a lawyer to work and have one lawyer fighting with another lawyer in terms of trying to resolve a dispute, we ask them if they can pay \$30 for an hour-and-a-half session. We bring them together, both husband and wife, if that is feasible, and we help them try to resolve their own problems. They are the ones who best know their situation in terms of custody of children and disposal of property, etc. It is a nasty situation, but we try to help them resolve it in the best way we can.

Another area that we have been involved with is in terms of employment disputes. Again, rather than going to an arbitration, what we do at times is we bring together, for instance, the supervisor and an employee and we try to see if we can resolve the problem and find out and reach an agreement that is acceptable to both parties.

Some of the other exciting areas in which we in Canada do very little are, for instance, in prisons, helping prisoners mediate their own problems, and in youth facilities, teaching kids who have been out of control and are in closed facilities, whatever, how to handle disputes without hurting the other person. In the area of schools, in southern Ontario I have noticed the amount of violence in high schools. Coming from Newfoundland, it kind of astounds me. But again, in that area mediation services, in the United States especially, have become sort of a full-blown area. In Canada, we have a number of programs, some in the Ottawa area, but very few developed.

The other major program that we have is VORP, which is the victim-offender reconciliation program. It was a project and now it is called a program so it has become somewhat institutionalized. Just flicking back for one second, in community mediation services that is myself, and that is a half-time position; that is, I work there two to two and a half days a week.

In VORP, which was developed at CJI in Kitchener, we have one and a half workers. Essentially that has been in decline since the early 1980s. It took off in the 1970s, as I explained, and at one point it was doing 160 mediations, in the early 1980s. There was a court case that came up in the early 1980s that essentially said that the judge had no right to really sentence someone to VORP, which was what was happening. Because of that particular case and a couple that followed that, VORP

dropped off dramatically. Probation realized the value of that and still following on in our philosophy in terms of trying to help victims is that we have been doing victim impact statement for the last number of years. Unfortunately, our work in terms of bringing victims and offenders together within that program has diminished greatly.

The prerelease program which we do is we have a half-time worker who goes into the prisons and essentially works out some of the disputes that are happening with prisoners and their families, trying to help them to resolve things before they go back home so it is not going to fall flat on its face.

"Well," you say, "what are some of the benefits of that program and how can it help us?" We would like to think that the programs that we have been involved with at CJI first of all are preventing crime, are preventing damage to our community. If I bring you back to the Hull case, if we had maybe had some mediation happening between those two men, somehow or other we, society, could have helped them to either separate and find different accommodations or worked out some sort of different parking arrangement, maybe we would have not one person dead and two families really devastated.

1030

The other thing is that because it is a whole paradigm shift in terms of the restorative model, essentially it brings in the victims very much. The victims are empowered so that they come into a process of where they deal directly with offenders. They are able to contribute and they are able to do some healing. Even doing the victim impact statements, as my colleague who is not able to be here today was telling me, a lot of times in interviewing victims they start off from a very vengeful position, and once you have spoken with them for an hour or an hour and half about what has happened, it starts to shift around to where they start to say: "Really, you know, I don't want something worse to happen to this person but I want him to realize that his breaking into my van or his breaking into my house really scared me. It's just really disrupted my family. I want something or other that will work so that he's not going to do that again."

The other thing is that we help to restore the balance in the community when we have some tragedies, through using mediation services. Coming from Newfoundland, I will give you a little example of where our system falls down. In the last week as we have come by the anniversary of the sinking of the *Ocean Ranger* where 84

people, most of whom were Newfoundlanders, went down off the coast of Newfoundland. It is interesting to bear in mind that none of those people was charged with any kind of criminal offence. The company went back to New Orleans and is really a name—that company will have nothing to do in Newfoundland. Newfoundlanders are extremely angry and pained by that because it affected so many families and our criminal justice system really fell down in that particular situation. You may say, “Well, it was offshore and it was off our coast,” and stuff, but the fact about it is that business itself was driven by putting people who were inexperienced and underqualified into positions like controlling ballast tanks. Once the men died, it was too late.

Another kind of thing that the mediation process does is that it reduces the anxiety and the fears of crime. By coming face to face with an offender they get some kind of sense of what they are dealing with. Sitting in a prison cell about two or three years ago, I interviewed this young fellow who was doing five years. He had been drinking one night in St John’s and had come off the street and just went into this person’s house—and it is not all that uncommon in Newfoundland to leave your doors unlocked—he had gone into this woman’s house, went into her bedroom and he knifed her in the chest five times.

He had at that time finished the third year of his sentence. I was sitting in his cell with him and we were talking about this and I said, “Well, what have you been doing about this?” He said: “Nothing much. I’m coming up for my mandatory supervision in another year’s time.” I said, “You’ve had dealings with psychiatrists and psychologists, haven’t you?” He said: “Oh, I’ve seen the psychologists now three times. I think have seen a psychiatrist once.” I said: “Come on now, you’re fooling me. You’re just really bullshitting me in many ways.” He said: “No, no, I am serious. I have not.”

I said: “Have you ever thought about that woman?” He said: “No. I haven’t given it a lot of thought. I’m really sorry for what I did.” I said: “Have you ever thought about what her life is like? For instance, when she goes to bed at night, what do you think it is like for her?” “Gee, I hadn’t thought about that.” “Do you think she would sleep alone anywhere? Do you think she would ever sleep in a house anywhere? What kind of a vision do you think she has of you?” He was a nice-looking young fellow and easy-going. I liked him a lot. I dealt with him both on the street and inside. I met his girlfriend, his family,

his little child who was three years old. He said, “No, I hadn’t thought about that.” I said, “My guess is that her picture of you is that you are this monster and my guess is that the other questions she would have are: ‘Why did he do this? What was I to him? I didn’t even know him. Why did he pick me?’”

Those are the kinds of questions that I think a lot of times in society we just do not understand. Why did the Montreal situation happen? Why did the Fredericks situation happen?

It gave him some thought about what he might do. The young fellow is probably on the streets here in southern Ontario, by the way. He was planning to go to Toronto. As far as I know, he is released now and would have been on the street about a year. He has not been dealt with at all. I do not what is troubling him. There are definitely some issues that are unresolved for him, especially when he gets drinking.

What else do we do? We empower both the victims and the offenders. Anybody who has worked with offenders know that offenders generally feel that they are outside the system, that they feel like they do not belong. They have never belonged. Most of them come from battered and bruised situations that they have grown up with. As a society, when we throw them in jail, we just confirm to them that, “We don’t want you in our community; get out.” We confirm that for them, then we wonder why they come back in a rage five years later.

A friend of mine in St John’s has started some programs bringing both victims and offenders together for property offences. What we have done is brought the victims into the home in St John’s, which is an old prison where they had honey buckets and stuff up until a number of years ago. They were just shocked in terms of the conditions in the prisons themselves. Having heard from some prisoners here in Ontario, I wonder if they would not be equally shocked here in terms of the overcrowding here.

In bringing both victims and offenders together—and these were victims not necessarily related to each other; they would not have been victims or offenders knowing each other—they had dialogue over about five sessions. That program cost less than \$500, but what it did essentially was, for the sake of the victims, it gave them some sort of a sense of being able to vent some of the experience in terms of what it felt like to have someone break into your vehicle. Even though the insurance paid for it, it is just—all of us have shared that kind of thing, someone violating your home or your space or

whatever. It is just the discomfort that you feel around them, and the violation. Money just cannot make up for that.

It also gave the offenders a chance to think about it. "Well, the insurance took care of that," or "Gee, Woolco's making lots of money and nobody really missed that." They do not experience a lot of times—I have sat down with guys doing armed robberies, for instance, and some of them said, "You know, it was like a sawed-off pin, it didn't hurt anybody." I said: "Well, you come into my store and you point a gun at me, I don't care if it's got a sawed-off pin in the gun or if it's a plastic gun. I don't know that at the time. All I'm doing is I'm scared there and I'm saying, 'God, I didn't say goodbye to the kids this morning, I didn't say 'I love you' to my kids,' and I'm hoping that nobody will come in through the door and frighten this teenager or whatever and hit him in the back and the gun goes off and I'm gone, or he trips up or something, or he panics or sees me reaching down to give him money and he thinks I'm reaching for a gun and he shoots me, and he's just all that crazy."

So one of the things that CJI aims to do is to try to sort of resolve and bring together and get understanding. It is not a wimpy type of program that says offenders must be told, "Don't do that any more." It essentially says that as a society we need to hold people accountable for their behaviours and not really ravage them further.

What kinds of problems do we run into? The major problem, I think, is in terms of linking the two paradigms, which are really classed in terms of a restorative justice model and the retributive model. The retributive model says that when we have got a problem, we slam somebody, we hit him over the fingers, and we make sure that he does not do it again. It is a deterrent model, which may work in some programs, like in drunk offenders, but I have real doubts, having come out of the prison system, that it has any kind of working for guys who are inside. A lot of times, programs like our own are considered airy-fairy and restorative models and off the wall.

Essentially the problem, as an example, is that we do not fund programs very well. For instance, my program, which could easily be a full-time program, is a two-day-a-week program. I spent the last four days or something, four of my working days when I could not be working with clients, having to go before the regional government in Waterloo trying to argue for \$7,000. We are dealing with million-dollar budgets.

Programs like my own are not going to pay for themselves. When you bring neighbours—if you

are lucky enough to get them together, because a lot of times the complainant will say yes and the respondent will say: "No, that so-and-so next door is just impossible to talk to. I can't talk to him. Therefore, I'm going to phone up my lawyer and my lawyer is going to deal with him." That is fine, let your lawyer deal with him, but he has got to get his lawyer and you have to get your lawyer and it is an incredible waste of funds and money, and it still just does not seem to work out.

Not to try to get too long-winded here, but there was a case last week. A woman phoned me up who was a small business owner. She lived down the road from this other small business owner, and this woman had been making wigs and apparently she was dyeing the wigs and doing some cutting and things like that for her. The first woman who had the business going felt that this other woman now was starting to go into competition with her as a business, so she brought her before some or other bylaw within the city of Kitchener. An arbitration board heard it and said essentially to the original woman who owned this business, "I'm sorry, the other woman can own her business also and you're going to have to live with that."

The person who phoned me was the second woman, who had actually been a friend of the other woman, and said: "I don't want to have to go to court with this woman, but she is harassing me to the point of—this is just really bugging me a lot. Is there something that we can do?" I said, "Well, I can phone the first woman and see if she would be willing to sit down." I said: "Essentially, you won. In terms of when you took it to arbitration, you won the case, even though she took it, and she is still bitter about her loss. So she is going to find any way she can to terrorize you, whether it's putting dogs out and having them barking or whatever."

1040

Another particular case I will just mention to you in passing was the case of two couples. It was an older couple and a younger couple living in a housing co-operative situation in Kitchener. This is a case where there have been at least five assault charges laid that are before the courts right now. It was a case of where they were good friends. The older couple was continuously looking after kids of the younger couple, to the point where they felt the relationship was being abused by the younger couple. They felt, "These young kids, 17, 18 years old, should be home. What are they doing out here anyway with kids and everything? They should be home with their parents where they belong."

Essentially this got to the point of name-calling, and here I am talking to this guy on the phone, the older guy, who is now up for uttering threats and he is saying to me: "I don't know how much longer I can keep up with this. I just feel like I'm going to hurt one of these people. I'm going hurt one of these kids one of these days. I've just had it with them. They're calling me names, they banged on my door New Year's Eve, they're terrorizing my wife," etc.

Can we resolve that? We hope to. We do not have enough time to develop the case to the full extent, so what I am doing is I am talking to this guy over the phone. That is 40 minutes talking with him. If I talk to this other person on the phone, I need to go out and sit down with her, have a cup of tea with her and develop this case. I cannot afford to do that time-wise on two days a week.

A lot of times we find ourselves just following funds. We are driven into doing things like victim impact statements and not doing enough restorative kinds of things like bringing victims and offenders together. Then there is people's preference for using lawyers, as I said, with regard to the neighbours. The neighbours would just as soon go out and pay \$280 an hour to a lawyer, to have one lawyer yelling at another lawyer, and it still does not resolve the relationship. They still hate each other, and in some cases, they have been living years and years next to each other.

There is a lack of education about this process, which we would like to introduce more into the schools, for instance, just teaching kids how to resolve disputes nonviolently, teaching that you do not have to bop the other guy on the nose to solve the problem, that there are ways where both of you can come out winning, so that people—ourselves—can learn this process.

The other kind of difficulty we run into is evaluating. How do you evaluate a crime that has not been committed? How do we know that we have not prevented a crime like that one in Hull?

Because of the time constraints and the money constraints, we do not have time to develop new programs. We do not have time, for instance, to get into areas such as environmental issues, so that when we have native groups up north fighting with another group, maybe mediation as a process might be used there. It is used in places like South America, for instance, at government-to-government levels, at employee-to-government levels, within labour areas and hospital situations.

We do not have time to train our volunteers, or we do train them somehow or other, but we do not have time to educate them fully, which is the way I would like to see it done.

I could go on with other things, but I think I will stop at that point. I want to leave you some time to ask some questions, and I will answer them as best I can. With the ones I cannot answer, I will just take some notes and maybe I will respond back to you later on.

I hope you understand my Newfoundlander. I have tried to speak as much mainland as I could.

The Chair: Thank you, Mr Husk. I think your mainlandese is very proficient, I must say. Mr McClelland has a question for you.

Mr McClelland: Mr Husk, I appreciate your coming here this morning. Could you just share with us some of the facilities you make use of in the community? In one of the statements you made, and I do not want to take it out of context or in isolation, you said that very often people have a tendency to want to use professionals from within the neighbourhood and the community, that there are in fact resources that exist there to solve disputes and work out problems and reconciliation and come to an understanding in terms of a relation between individuals.

Clearly in your victims' services program you have treatment and education, so you are relying on outside professional expertise from time to time, I take it. I would like you to qualify that, if you can, and to the extent that you are using professionals in a referral system, what kind of access to professionals within the community and what kinds of programs do you interact with, if in fact you deal with them?

Mr Husk: You have a number of questions there, and I am trying to sort them out. In terms of whom we use as volunteers—

Mr McClelland: Volunteers, and also the professional services. What, if any, professional services do you use; more particularly, I would think, your victims' services program? I presume, perhaps incorrectly, that from time to time, and perhaps all the time, you take victims or look at treatment for victims in a professional context and provide them with professional assistance in dealing with the trauma of being a victim. In short, my question, in summary, would be, what resources do you have in the community, what kind of access do you have to those resources, what kind of co-operation do you have with the professions and existing agencies that provide victims' services? What linkages do you have in your community?

Mr Husk: Just as a bit of a backup in terms of the people we use, we make extensive use of volunteers, because our idea, again, is that we are going to educate volunteers. So as a co-ordinator, I am not doing many mediations at all. What I am doing is using people who are, generally speaking, not necessarily professional, but they have been trained. For instance, we would be using in some cases social work students, social workers, and generally speaking, they tend to be quasi-professionals. I am a volunteer in one of the sex offender treatment programs, so I facilitate a group for offenders which meets every week.

The model that we are based on is a self-help model, so a lot of the victims are helping each other. The idea is that within all of us we have the strengths to solve a lot of problems. When we run into more severe things, then we make referrals across.

For instance, if I am doing a family mediation and there is an example of where this couple is not really into doing a separation, but really, in essence, they are just questioning their marriage, then I would refer that on to another agency to do marriage counselling, or in a case of the victim services, the co-ordinator in that case, besides the group work, would say to the person, "I think that you might consider doing one-on-one counselling," and she would give her a list of names.

In my own cases, with regard to the family mediation, I have a list of lawyers who are sympathetic to mediation, and in all of our cases, in terms of separation and divorce and that, we would say: "You need a lawyer backup. You're going to reach an agreement, but in protecting your own rights and whatever, you need to go back and check out the order and make sure that things are okay."

Is that helpful? What we do is that we have good linkages with other agencies. Other agencies refer to us and we refer to them.

Mr McClelland: I am going to play devil's advocate, if you will.

Mr Husk: Sure.

Mr McClelland: I want you to understand that I am coming from that context.

Mr Husk: Okay.

Mr McClelland: You are acting as a volunteer working with an offender, and there may be some signs, some significant indicators that individual is a very, very troubled person and has deep-seated psychological problems. Because of the lack of adequacy—and I say that with the greatest

respect—of some of the volunteers, they may not pick up, they may not read some of those signs. What kind of safeguard or what kind of processes are built into it in terms of supervision from professionals, if any, where potential offenders who have severe, yet masked, deep-seated problems are not dealt with appropriately?

Remember the context I am putting that to you in, because I am sure some of the criticism is going to be: "You've got a difficult problem there. It's masked and you're not capable of reading the signs and only a 'professional' can pick up the little nuances and pick up the signals that say, 'This individual needs serious professional care to deal with his or her problem.'"

Mr Husk: In that particular circumstance, usually we are dealing with another agency. Most of the guys who come into the program are on probation, for instance, so they have a probation officer they are seeing. In some cases, they are also seeing a therapist. They may also be in other groups. Some may self-refer.

The other thing is that we have regular meetings with a co-ordinator. As a co-ordinator, I meet with my volunteers on a regular basis. We also do an evaluation process by the people who are involved in the dispute, because I want them to tell me what they thought: "Do you think this mediator was biased? Do you think he was swayed one way or another?" That feedback comes back to me.

For instance, in a family mediation, the way we protect situations of power imbalance in wife dispute or spousal dispute is—we are really leery to go into mediation with that. We do put in both a male and female all the time to make sure we protect for that imbalance, and I will check with females especially, because if there has been any kind of abuse, "Are you going to be able to say to your husband that you have some issues," or whatever. That has been a criticism that has been levied against mediation, generally by the feminist movement.

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Mr McClelland: One of the more notable, well-known self-help groups, of course, is Alcoholics Anonymous, where a person is an alcoholic, he joins a self-help group and works with other alcoholics. It is clearly an accepted program in our society, and our communities generally accept that happily and recognize the utility and the success of such self-help groups.

There is obviously going to be a little bit of a bias to bringing together, for example, sexual offenders in terms of self-help. What kind of problems have you encountered in terms of the

resistance in a community to accept that people who are offenders are capable of helping themselves, and on the positive side, what results have you seen from people who have had like problems and have come together and articulated their difficulties or experiences in society and helped one another integrate back into society?

Mr Husk: I will qualify my answer by saying that when I am answering for you, I am answering from 3,000 miles away in St John's in terms of having viewed the victim and offender program from there and having listened to programs on the CBC, like Ideas, which have presented the Kitchener model.

The whole idea of bringing together victims and offenders is not done lightly and it must be at the request of the victims themselves. Even though our bias in terms of the restorative model is to thinking that full circle, in some ways, they need to face that, that is their decision.

So when I run the group for offenders, I do not run that group; I facilitate it. We have had real issues in our group as to, if I have started doing therapy—I am a therapist also—they have really sort of come back on me and said, “This is not a therapy group.” It is not; it is a self-help group. That essentially says that they try to empower themselves. A lot of times, by the way, many of the sex offenders I have dealt with follow an addictions model.

So that is not done lightly and that would be done very, very cautiously in terms of how they do that and how they make that engagement.

At the VORP level, which is the one-on-one victim and offender, that is essentially done like in the Genesee project which works out of New York, which works strictly with violent offences, by the way. They might take a year or a year and a half or two before they bring victims and offenders together, and they will only do that in terms of their major bias towards the victim. They will be dealing with both parties and they will see it as a helping process for victims and not trying to punish victims more, so that we are not in a sense using victims for our ends in terms of what our bias is towards a restorative model or whatever.

Mr McClelland: One last question. As far as the community mediation service is concerned, once you get people to plug into the program—you made reference in your comments too about the difficulty of getting people through the door, if you will, and the resistance that one or both parties might have.

Mr Husk: Usually the second.

Mr McClelland: Yes. Given the situation where both parties agree, at least to undertake an attempt to deal with the issue through mediation services, what kind of success ratio have you experienced generally?

Mr Husk: Generally, I think it is really successful. The VORP program coming out of the Boston area that I was looking at had a 75 per cent success once they get in. With our programs, it is not clear what our success rate is, but you are through the process to a great extent when you bring the people face to face. There is a good chance you will reach some sort of resolution, because the ground rule for mediation is, first, that one person speaks and the other person has to listen, so you train people in just listening instead of fighting with each other. So the success rate is fairly good once you get into mediation. The difficulty is getting them into mediation.

But that is not to also dismiss—which is some of the fights we have with some of the levels of government—the cases I hear that never go to mediation, that there has not been mediation done. The fact that I spent 40 minutes on the phone with somebody, for instance the complainant, may in a sense, from the complainant's point of view, first, he is being heard by another human being. That is really good. The second thing is that both parties, both the respondent and the complainant, may say, “Maybe I'm blowing this out of proportion. God, there's this other agency now which is phoning. What's going on? Maybe I've got to temper myself down a bit. Maybe the issue with my next-door neighbour, maybe the old fence is not all that big an issue.”

That is a typical sort, fences. I suspect that, once April comes and spring appears, people come out of their houses and, all of a sudden, see hedges and stuff; and hedges and stuff are the kinds of things that people go on about. They are grey areas and we kind of chuckle about them, but at the same time they bubble up at times. They come to the point of consuming people. I have talked to people and it just consumes them. Any of us knows that if there is some sort of nagging thing with the neighbour next door, it starts to take over our whole lives and we just cannot step back from it.

Mr McClelland: But for that consuming element of passion, where would Judge Wapner be today?

Mr Epp: I have just one question. Often, through either perception or reality, I guess, we get the impression that the person who has

committed a crime gets a lot more benefits than the victim. What do you do to try to correct that?

Mr Husk: What do we do to try to correct the misconception?

Mr Epp: The reality too.

Mr Husk: I guess, having come from a strong offender bias—actually, I play a number of roles with offender rights groups—what is happening is because the the adversarial system we have, as I explained before, essentially treats the victim as on the sidelines. Because of that, we somehow or other have thoughts that if we give victims more rights, then we lower offenders' rights. In essence, I do not see why we cannot raise both.

With regard to offenders' rights, with the Constitution coming in, for instance, and the charter having been introduced to Canada, there are all sorts of questions as to whether we are doing a lot of unconstitutional things with regard to prisoners. With regard to victims, we are stuck with a model where we are trying to squeeze victims into this process which comes out of our tradition of saying that the Queen has been offended, not the victim. The victim is secondary. The Queen's good law of the land has been broken and the Queen has been offended. We want a victim to say that is what happened.

I had a friend of mine who was raped. I spent some time with her and also worked with her rapist, who was a double rapist. I found myself in a real conflictual situation with regard to that. Having talked with her, I felt her pain too. She knew nothing about when this guy was getting out and that was frightening for her. I was talking to him and he was saying it really was not rape. So we have these two people. We have the system dealing with this one guy and we have this other person sort of sitting off on the sidelines wondering what is going to happen when. Because we are into that adversarial approach, which is what I am talking about, the shift in paradigm, it is a whole shift in saying that both of these parties, along with the community, those three parties, should be involved in resolving this damage that has been done. She should be able, somehow or other, to have the right, if she wants it, to express her pain to him and the community as to what has happened to her.

Mr Epp: Let's go back to the situation you alluded to earlier, the one where a person stabbed a woman several times. He saw a psychologist several times and a psychiatrist on at least one occasion and so forth. In that case, aside from her medical care, she may have needed some psychological attention too, and I doubt very much that she got it.

Mr Husk: I doubt it.

Mr Epp: And yet society will put it all on him and forget about her.

Mr Husk: But they have not put anything on him; they have locked him away.

Mr Epp: They have locked him away and given him some attention anyway.

Mr Husk: He goes inside, twiddles his thumbs, looks at himself and feels sorry for himself. That is what people fail to realize.

Mr Epp: I am not saying he should not have gotten it, but I am just saying that in the balance of things society ends up putting him in jail and spending \$50,000 a year on him, \$250,000, and they give her \$20,000 for medical care and that is it—"Go home and don't bother us again."

Mr Husk: Yes, it falls between the cracks. That is what I am saying.

Mr Epp: And you are saying then that the Queen's law has to be attended to.

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Mr Husk: I am not saying that; I am saying that the system we have, the system that you and I have as a community, says that if I get into an assault with you a lot of times there is no right but to lay charges and therefore the two of us have to go through court. You and I may be good friends and whatever and have gotten into that assault and be just as satisfied for someone else to sit down with us and help us resolve what has happened between us, but because of the way our system works now, with the low level of discretion, for instance, then there is no place for us to go. The police come—and they are faced with these situations a lot of times—and would like to in grey areas, I think, have some sort of way of referring it on to someone else to solve our dispute. That is the most common sort of thing.

The stabbings and stuff like that are low percentages, and we tend to blow those out of proportion because they make the news. The kind of thing that breaks down is that our relationship has been damaged. That affects your wife and your family and my family. I will say to my kids, "Don't play with his kids. They're no good, rotten," whatever. You and I still have pain between us. What agencies like our own say is that what needs to be solved is that there is you and me and what is bothering us. It is more than just the fight. The fight is just the kind of pimple that we saw. Underneath that it may have been that you, let's say, embezzled some money off me or something. We were in partnership at one time and I felt that you were lifting out some

money. I felt that and I played through my own myths and never checked that out.

We had a case last week where we had one staff member ready to quit. Actually, I did mediation between the two of them. One person came in and blew up at the other person, "How come you're treating this person different from this other person?" So we just did it as we do a mediation session. One person expressed her point of view of what had happened and the other person expressed hers. What we found out is that both of them had misinterpreted what had been done. This woman at the desk had said that, "Since we have no smoking in other areas in our building, why don't you go into the other room right now and use that room?" The second woman interpreted that as, "You don't want me in this room." Once they had both expressed that, what we had done was repair some myths: "Oh, you really cared about me then. You were saying that maybe I'd be more comfortable in the other room."

The system, if you look at the justice system itself, takes a clip of truth and it looks at that. It does not want to hear the whole case. It only wants to define that this particular information is laid, it wants to take this element and it wants to find out did that happen or did that not happen. So we have cases before the courts now which we all follow day by day, murders or whatever, and we look at this and see a little sliver of truth and we do not get to see any further because the whole technological thing is that two lawyers are technocrats almost, to an extent. They are using their language in their situation and they are defining that within that particular technical thing this person is guilty or not guilty or is beyond a reasonable doubt, and you are going to come out with winners and losers. My guess is that essentially the victims come out losers and the offenders come out losers. I have to say that most of my work has been with offenders, and with victims in some cases, especially sexual abuse, coming from Newfoundland.

The real question is, how do idealistic groups, like ourselves, which are based on a restorative model engage with a system that is based upon punishment? Not easily. When it starts getting to the political level, it gets even more difficult.

Mr Epp: How do you correct it? Give more leeway or more latitude to the police officers when they lay charges when crimes have been committed?

Mr Husk: One of the ways of doing it might be, for instance, if programs like our own had enough stable funding so that we could develop,

for instance, better relationships with the police. The police could refer to us. That would be good, that they would have grey areas and say: "Jeez, I don't know if a charge should be laid in that area, so we're referring them to you." I get some referrals from the police. That is one thing.

The other thing on the front end of it, which to me is a much, much better end of it, is to get at the educational level so that we teach our kids how to resolve disputes, so we deal with race at the school level, so we deal with racial problems early on and teach kids as a matter of fact and as a matter of education how to resolve disputes and that they can be resolved without necessarily bopping somebody else in the nose, as I said before. To a great extent, the model we use—if you scan your TV any night—is that the person who wins is the person who is strongest, but all of us, from personal experience, know that is not reality. Most of us want to live in a nonviolent world. Most of us in this room, I would hazard a guess, do not want to be faced with violent situations in our neighbourhood or community. We want to feel reasonably assured that disputes can be solved.

Mr Epp: Most of us; I would not think there is any more than one per cent, if that.

Mr Husk: That would be the other way, and they are just so badly damaged. What to do with the really, really badly damaged I am not sure. That is a case of, again, how do we hold people like that and treat them.

Mr Epp: I suppose the only people who want to live in a really violent world are the ones who go out there and—not everybody wants to commit a crime. The mercenaries and some of those people who sell their soul for another country to go to war, those kinds want to live in a violent world, but most others do not.

Mr Husk: Right. I have dealt with people also who have done some really violent things in the community and spent time sitting in their cells, and been amazed that when you reach in behind the hard exterior shells there is a softness, there is such deep pain. In some ways, that pain comes back on us with a vengeance when they come back out on the street. There are just too many examples to quote on that. Somehow or other we as a society really fall flat on it, because of the fact that we are determined to separate and punish, and we will use the hard stick to get our way, and we do not model and we do not give a lot of credence to things that can be resolved nonviolently. It is unfortunate.

So how do we marry these two? I am not sure that they are marriageable. That is my own

belief, and that means a whole shift in our way of thinking. For you, that presents real problems in terms of how do you translate that into something that is acceptable to the public. As I said, on the front end of it I think it is pretty straightforward in terms of mediation services. If we have mediation centres—like, in Toronto, the St Stephen's Conflict Resolution Centre, which I am hoping to visit in the next couple of days—they have case workers who go out and do the development of cases. That is a luxury for me. I cannot afford to do that; I cannot afford to go out. That case with the five assaults before the court, which at some point or other somebody may seriously damage somebody else, I have got to try to figure out some way of being able to do that. I will try to intervene and salvage that on minimal resources. That is where our priorities are.

Mr Jackson: Gordon, thank you for your presentation. I am personally intrigued by it because in four and a half weeks I will be presenting a private member's bill to the Legislature dealing with victims' rights for Ontario. I think it addresses in part the notion, as you said, that we do have a judicial system which is on behalf of the state, which is not as sensitive to victims as it could be in terms of elevating both. I could not help but be struck with how comfortably some of your recommendations fit within the framework of my private member's bill. Are you familiar with some of the victims' rights legislation? The only jurisdiction in Canada that has it is Manitoba. Are you familiar at all with it?

Mr Husk: Somewhat. As I come from a heavy offender background, bear in mind I have some bias in that area.

Mr Jackson: But it does address, for example, some of the concerns that we promote a system which is further polarized by virtue of the fact that, for example, in the case of violence against women—which is the area I am responding to in terms of what caused me to look at these injustices and bring forward a private bill—we have a situation with victims' compensation where a woman who has been raped does not automatically have access in this province to the consulting and the counselling services. They are not necessarily fully accessible or paid for; not in all circumstances are they available to a victim. Furthermore, when they go for victims' compensation they have to go through the trial of the rape a second time in this province. Hopefully we can tear down that adversarial approach in court, which is the second time a victim goes through the situation. Then, to go for the compensation

fund, she now has to live through the process a third time.

Surely there must be some means, with the skills that you promote in the mediation model, which would allow us to deal with the issues of compensation for victims without, in essence, making a woman go through the horror a third time. Are you familiar with—

Mr Husk: I am not familiar enough with that to be able to comment on it. Having attended some international meetings on prisons and whatever, I have been struck by the Scandinavian model, and especially in Holland, in terms of women going through the civil courts. I saw in the newspaper in the last couple of days some case here in Canada where somebody had gone through the civil court and really had, in a sense, empowered herself. She dealt with that issue herself. Some of the argument, especially from the feminist movement, is that the woman herself is empowered in that process, that she has some control, whereas in the court system she essentially sits as a pawn and there are lawyers.

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Mr Jackson: One of the outcroppings of our system is that, for example, women have the lowest degree of access to the compensation fund because of the way it is structured and therefore they are denied. People who have automobile problems have great access to it because they just throw it into the hands of a lawyer and off they go. But victims of violence do not use the fund because of the way it is structured, certainly in the statistics I have looked at. Also, with regard to the recapture rate for those criminals who have the ability to deal with contributions as part of the mediated settlement, we have one of the lowest rates in all of Canada as well.

But I was generally interested in the notion of how we change the system. I see Mr Epp was also on to that point as well. Do you have any specific recommendations for this committee in terms of court reform, one in particular that you would strongly recommend to the committee?

Mr Husk: I do not have any particulars, but what I would say to you is that it would certainly be worth while exploring a bit more in terms of the VORP model that is used; for instance, with regard to police, that at the charge level they may have some discretion to pass over some cases; that at the crown level, rather than going through this case the crown may very well present it to a victim and its service to see if there is some resolution that can come through that. You can also have a VORP intervening at the post-conviction and pre-sentence level.

It just seems to me that, to a great extent, the courts get tied up with all sorts of things that could be resolved outside of the courts.

Mr Jackson: I could not help but notice your point about the notion of when a person is going to be paroled or early discharge, that the victim be somehow notified and that society understand both their needs: for the perpetrator to get back into the community, but also the need for the victim to understand that there is a degree of safety, there is a degree of understanding. I had a celebrated case in my own riding of someone who, immediately upon release, took a shotgun and went into the place of employment of the young lady who had participated in his conviction for a violent crime against her. We had a holdout in this office for about five hours with a gun at her head. It strikes me that there is a more meaningful role in terms of preparing for that and in terms of preparing the victim for their understanding. My bill addresses this issue, but my bill also addresses impact statements for the courts, that this is shared with the offender, so that he understands the degree to which his crime has impacted on the victim, and that somehow the courts bring the parties together to an understanding of just what kind of social consequences personally were felt by the victim.

I will send you a copy of that bill. I would appreciate it if you would take a moment and critique it for me. I did write letters to 145 countries around the world and I received—aside from a wonderful stamp collection I created for myself—some incredibly interesting pieces of legislation from Scandinavia, from Australia, from New Zealand and from one or two jurisdictions in the United States. It is an amalgam of the research that I was able to do over the last two and a half years. I will be pleased to share it with you.

Mr Husk: Yes. You wonder in some ways if that could not have been prevented somehow or other. We had all this time. A guy sits in a cell for two years and mulls this over, whether he does treatment or whatever, but you wonder in some ways if some objective organization—because the prison system itself is just so distrusted by prisoners—could have intervened and done some smoothing it away.

The Chair: Mr Husk, I have got several questions to ask. First of all, you are obviously somewhat of an expert in the area of conflict resolution, particularly having worked in different parts of Canada. I think it might be instructive for the committee if you could indicate what you think the state of public awareness is of the whole

issue of ADR, or to put it in other words, how deep are the roots of the so-called new paradigm of restorative justice that you refer to?

Mr Husk: First of all, I am not an expert on conflict resolution. I come to you, as I said prior to this, with minimal mediation. I am picking this up on the fly as I go along. Whether I am devoted—and I am—to the restorative model, I feel much more comfortable with that, and the ADR comes out of that.

You are asking me a couple of questions which are blended in together. My guess is that with regard to the restorative model, it is not well known. We propose—and again I come out with a biased statement here—if we live “a Christian life,” that is based upon a restorative model, and that is supposedly what is in our schools and stuff, but essentially we have somehow or other shifted over the centuries to very much a retributive model in terms of punishment as how we control wrongs.

In terms of when there is damage done, what we usually do is we want our pound of flesh. We want to make sure that this person pays for the damage that he has done, as opposed to the restorative model, which says that we want to repair the community as much as we can. So that is a whole shift. I look and I scan at all the models around and I see very, very few based upon the restorative model. If I looked, I guess I would see Mahatma Gandhi or King, and I am reaching idealistically when I am at that. There are other people too.

Generally speaking, we certainly say with regard to most of the countries that were based on nonviolence that we do not accept violent solutions to problems, but we usually opt to have someone else solve our problems in terms of two parties appearing before a third party and the third party makes up his mind. The restorative model flips that around and says that the third party is strictly a catalyst. They bring the two parties together to resolve the dispute.

To a great extent, we have a punitive system, and I guess part of co-opting restorative into that is that it will just destroy the retributive model.

So it is not that well known.

The Chair: Maybe I can ask the question in a different manner. As committee members, we have seen a number of experts come in to us over the last eight days. It is obvious to us—I think I can speak for the other committee members—that there is a phenomenon happening out there where we see in the area of environmental law, the area of family law, the idea of private courts where you rent a judge, as it is called, there is something

happening out there where people are trying to resolve their disputes other than through the traditional adversarial court structure. Really, what I am trying to gauge is, to what extent is that a societal phenomenon that is happening out there? To what extent is your particular group that you are associated with part of that phenomenon that is happening out there in society? We are trying to gauge the extent of that.

Mr Husk: Coming from Newfoundland, I will explain it from two cultures, in a sense. In Newfoundland, it is minimal in terms of using that dispute mechanism. Coming to southern Ontario and having been here only for a year, I am impressed with the amount that that is catching on. I think people are entranced with it once they experience it, and once you sit within a mediation process, it is an empowering process, so that you come out of it feeling: "I have been heard. I haven't had a lawyer speaking for me. I've been heard. And I have reached this decision, not a judge."

I think that, to a great extent, is spreading. In the United States, for instance, the school mediation has just sort of blossomed and spread right throughout the US. The things like the VORP programs have diminished. So my guess is that it is growing.

How well known is it? Generally speaking, I still find myself on the phone explaining to the everyday citizen what mediation is, and also to professionals. They tend to think of it in terms of arbitration, "Who's the expert who's going to come in and decide this?" It is not an expert. It is a person who is skilled in communications, who is going to help two of you resolve the problem.

The Chair: In terms of the educational components that you referred to or the public awareness side of the issue, I want to refer to Hansard when Ernest Tannis appeared before us as a witness last week. He was one of the founders and is presently co-ordinator of the Canadian Institute for Conflict Resolution. He indicates:

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"Thanks to the Ottawa Board of Education and Woodroffe High School, which is in your riding"—which is Ottawa West, incidentally—"the first peer mediation program was launched in Canada at Woodroffe High School. Ivan Roy was the vice-principal. He was totally against this," and then there are some other comments and he goes on to say: "At the end of two and a half years, the bottom line of this story is that Ivan Roy has now resigned from Woodroffe High School, and starting this June he is

spending the rest of his life promoting school programs in Canada on a full-time basis with our institute. He saw it work. The climate of that school is different. The principal has said that suspensions are down one third."

I would ask, first of all, were you aware of this particular pilot project, if I can call it that? Second, if you were giving any advice to our Ontario Minister of Education with respect to this type of pilot project or any other, what would you be saying to him?

Mr Husk: First of all, I was aware of it, because I went to the peace-making conference last spring in Montreal. I think the same kids from that school actually presented a play on mediation. It was quite well done and entertaining.

The second part of it, I guess, is that my recommendation around that is that that would be stimulated. Maybe what they would do is pilot out, and at least in the various regions, help them to introduce those. Certainly one of the areas I have noticed in coming to southern Ontario is in terms of the race tensions that are in schools, and I have certainly noticed in the Kitchener-Waterloo area the violence in terms of knifings and kids doing all sorts of things there in schools.

So what has to be done is that if you want to, and that is what I am saying, I guess, part of the curriculum could be very much in conflict resolution, and that can start at the primary grades. It does not have to start at the high school in terms of kids, how they resolve. In places in the US they have kids who go around, and I was explaining this to my daughter yesterday, who is 10 years old, and they are called Fussbusters and they just wear black shirts and they go around the schoolyards and the kids who are getting into fights and whatever usually come to them and use them to help resolve disputes. At the university levels, campus mediation is being used at the University of Waterloo where, for instance, disputes between professors and students. They use co-mediators. One would be a professor and one a student.

Interestingly enough, just as a little clip on that, that service is not being used all that much, and I wondered why. There are lots of disputes on the go.

The Chair: I have got a couple of other questions. The first one deals with the issue of regulation. A number of witnesses dealt with that and it has become apparent to the committee that governments, at least in Canada, have not taken any broad-based policy decisions on the whole issue of alternative dispute resolution.

Gordon F. Henderson, who is past president of the Canadian Bar Association, made a recommendation that the province consider a legislative framework, and included in that legislative framework would be the concept of having a self-governing body that would in some way control the credentials of mediators, conciliators and arbitrators and perhaps look into the whole area of training for these particular people.

I want you just to hold that fact for a minute, and then I want to direct your attention to two factors coming out of your answers here today. First of all, you are a co-ordinator of community mediation services out of Kitchener—

Mr Husk: Waterloo region, actually.

The Chair: —and you have indicated by your own words that you are not an expert in that field.

Mr Husk: Right.

The Chair: Second, you indicated in your operation that you have basically an operation based on volunteers who are trained in some fashion within your organization.

My basic question is, do you agree that it is a proper area for provincial government policy to look into in terms of regulating, in terms of controlling ethics or maybe standards for mediators, conciliators, etc? Second, how would that impact on your type of operation, where you use essentially volunteer mediators?

Mr Husk: That is a big question. Off the top of my head, and I do not have my own head around enough around the whole thing of regulation of mediators, some of the concern I would have around that is that it again sort of brings it to the point of, most of the people going into mediation come out of either legal fields or professional fields, such as psychologists, and coming out of those, they are used to dealing with associations and having all sorts of guidelines. It is very easy for them to again slip back into the same pattern.

Philosophically, what we have said is that people are quite capable of solving their own disputes and that people can be trained to solve disputes. You do not have to have the special eight years' training or four years' training to do that. In a sense, that is the whole idea of regulating. It goes against the principles that we are saying people are quite capable of solving their own problems if they do not have to pay \$100 or, you know, where mediators are starting to charge about the same amounts as lawyers in terms of mediation.

Yes, there should be an ethical code. I am aware that the Ontario family mediators certainly have guidelines to follow on that. How people

like myself operate is that I go to my most experienced mediators and I get feedback from clients, and I use my best mediators, people like Dean Peachey, who appeared here last week, as both a resource and also as trainers. So we do expect people to have some minimal qualifications and we do the screening. We do not just sort of let anybody go in for mediations.

The Chair: One final question. It has to do with the area of the correctional services in Ontario. I am absolutely appalled, personally, that a very high percentage, I think it exceeds 80 per cent of the people incarcerated in our provincial institutions, are there for nonpayment of fines. They go to court for one reason or another and the judge basically says 90 days or \$5,000. They choose to put their time in in the institutions. The institutions are very crowded. They are very expensive, at a very high cost to the taxpayer, and I guess at a very high emotional cost to the people who find themselves in jail, effectively because they do not have the money or they have chosen not to pay a significant amount of money for fine.

Do you see that, from a provincial government policy point of view, there is a significant area here for mediation in terms of trying to find alternative ways to incarceration for people who are in jail because they have not paid a fine?

Mr Husk: That has been an old pet of mine for many years, and prior to mediation. I cannot come off the top of my head in terms of that, but I think that there have to be better ways of utilizing our facilities.

To me, it is just crazy that we have people in prison for fine defaults. I have dealt with people who have been in for four days, at \$100 a day, at least in Newfoundland, to to pay off a \$60 fine, which just seems crazy. We have essentially put out \$400 and we still have not got the \$60 back. Somehow or other, if there was a way of going and dealing with the people, of working out some sort of a repayment schedule or whatever, that should be feasible. My guess is that there certainly would be room for mediation within that.

The Chair: Do you think that in lieu of the money, which some people do not have, perhaps community service, agreed on through some sort of mediation, might be suitable for this type of case?

Mr Husk: Oh, yes. I do not see difficulties with it, but to a great extent that—well, to give you an example, I interviewed a guy in St John's one time who had come in, and he was on welfare. He had shop-lifted downtown. He got a

\$50 fine. He was getting \$63 a month social services and he had to pay the \$50 within a month. The \$63 was for all his personal items.

It was absolutely crazy. I mean, surely as a sophisticated society we could come up with some alternative ways of dealing with it. Whether that be through a community work order or trying to employ the person or whatever, there has to be some alternative means for that.

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The Chair: Thank you, Mr Husk. I do not see any other questions—whoops, sorry, there is another question. Mr McClelland.

Mr McClelland: I hope you would not rule me out of order, Mr Chairman—

The Chair: Not at all, just proceed.

Mr McClelland: —if I wished Mr Husk a happy birthday tomorrow.

Mr Matrundola: Right. Happy birthday.

Mr Husk: Thank you.

Mr McClelland: Thanks for coming.

The Chair: On behalf of the committee members, Mr Husk, I want to thank you for your presentation and answering our questions. I am sure they will be very useful to us when we do our final report. Thank you.

Mr Husk: Okay, thanks very much.

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

The Chair: Our next witness is Judith Keene, and I would ask her to please come forward. She is director of appeals in the Office of the Information and Privacy Commissioner/Ontario. Ms Keene, I would ask you to make your presentation and afterwards we will have some questions and answers, I am sure.

Ms Keene: Good morning. I want to thank you for inviting me and to apologize that I did not get my material to you in advance. For that reason, I had probably better just recap it. I do have something in writing that I have just given today, which I am sorry I could not get to you beforehand.

I think I should start by saying that, as I am involved with the process of dispute resolution which is governed by a piece of legislation and it is a very narrow sort of dispute, I will probably be of less broad-ranging use to this committee than others who are involved in wider questions and attempting to settle those wider questions, such as child custody.

But just to start off, the dispute that is dealt with under the Freedom of Information and

Protection of Privacy Act in the form of an appeal generally is a situation in which someone has asked for recorded information from the government and has been denied. There are other sorts of appeals, and I have listed them in my written material, but generally speaking, that is the dispute. The Information and Privacy Commissioner has a mandate to be the final arbiter as to, for example, these questions of access to information.

What happens is that there is an act which guides the head of the institution. The head of the institution is typically a minister of government, and the authority may be delegated. Under the act, the head makes his or her decision as to access initially and is guided by the act. Essentially, the requester, who is now an appellant, is saying, "No, the head made the wrong decision under the act," and that is the nature of the dispute, so we have a fairly narrow area of dispute. Is it or is it not properly exempted under section whatever of the act?

Having said that, what happens in an appeal is that the appeal is assigned to an appeals officer. The committee may be interested in the background of appeals officers, and I will certainly get into that, if you like. The appeals officer obtains the record from the institution and the correspondents and a copy of the decision of the institution, reviews the record and the correspondence and essentially takes a look at the decision made by the institution.

It is a new act. We do not have enormous amounts of experience with it, but it has been a couple of years now. At this point, the appeals officer is in some position, at least, to look at it and say, "This has been exempted under section whatever, does that make sense?" right off the bat, if the record looks right on the face of it to answer the description given in a mandatory exemption under the act. There is probably little more to be said in terms of whether this is going to go out, because if it is mandatory, the head has really no discretion, the head must withhold this record. If it is discretionary, that is another matter. The head may withhold or grant access to a record in whole or in part when it is discretionary.

But supposing it is something quite clear-cut, on the face of the record, for example, it is a cabinet document and it comes under a mandatory exemption, in that case, the mandate of the appeals officer is to speak to the appellant. This is where I think the mediation as sort of a tool to achieve some sort of settlement comes into play, because you are essentially saying, as an

unbiased person who has seen this record, which of course the appellant has not: "I have seen this record, I have seen the act, and I must say there isn't a very good case in your favour. I wonder if there's something else that can be done that might answer part of your wish for information of this nature. Maybe the institution has something else," that sort of thing.

The other, flip side of the coin—and there is a spectrum on this—is that, supposing the officer, upon getting the record, looks at it and looks at the decision of the institution and says, "Look, I really don't quite understand why this exemption would have been applied to this record," then the officer is in touch with the institution to discuss what reasons lay behind the classifying of this record under the particular exemption under the act.

It is early enough days under that act that, from time to time, the institution essentially says, "Whoops, I guess it really doesn't fit under this exemption." Either it properly fits under another exemption or it does not fit under an exemption and maybe the appellant is going to get the record after all. Sometimes a settlement is achieved that way. It is essentially: "On second thought, it looks like we didn't classify it appropriately. I guess this appellant really should get this record." Sometimes settlements are achieved on that basis.

Much more often, you have the middle ground—I think I have used a coin analogy, so that does not work very well—which is complicated. It is all sorts of different records, all sorts of different exemptions. Some clearly apply and are mandatory, some are not so clear, some possibly do not apply, that sort of thing. And we sometimes get partial settlements in terms of the requester getting what he or she wanted originally. Sometimes, for example, upon discussion with the institution, the institution says, "I think we can give part of this record," or whatever. It is a sawoff. The requester says, "That's fine, okay," and it gets settled on that basis.

Underlying this whole thing is the fact that the requester can always go on to a decision by the commissioner, who has a final power of decision on this, "yea" or "nay," in terms of the fate of this appeal. The requester/appellant never has to stop at the appeals officer and accept a settlement when he or she does not wish to. It is always the option, it is always possible, for the requester/appellant to go on to an adjudicative process in which the commissioner gives the final decision on this thing. That is made very clear throughout, which I think is very important.

But having said that, we have settled to date quite a large percentage of our cases. I have not got all of the figures for this year, and it would only be your number two figures, but I think we are running somewhere around 50 per cent, which is not bad, I think, under most legislative schemes.

I think probably that is a recap of what I have given you by way of written information. I wonder at this point whether there might be questions, or should I elaborate on anything?

The Chair: I have a particular question at this point. It refers to page 3 of your brief, where you talk about the mediation process. It indicates: "Upon receipt of an appeal, the file is assigned to an appeals officer (officers are senior employees with experience in investigation and/or dealing with complex statutory schemes; many are lawyers)." In the course of the last week and a half we have heard a lot of comment about the very special skills that mediators need and, second, how important it is for these particular people to be unbiased and neutral. In fact, some people refer to them as "neutrals," as a class of people. Can you say that the people who are dealing with these appeals are neutrals in that sense? And to what extent would they have had any special training in mediation or conflict resolution?

Ms Keene: First, it is very important that they be, and appear to be, unbiased. I suppose if that is the definition of neutral, then that is what we are talking about here. I think probably I may be saying what you have heard throughout, that this is absolutely essential. You cannot seem to be an apologist for either side, really, an advocate for either side. That is a tough row to hoe sometimes, by the way.

The Chair: How is that possible, from a perceptual point of view, to a member of the public who is coming in for some sort of mediation of a dispute and this person is a senior employee on the government payroll, so to speak? Does that take away from the perception of neutrality at all?

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Ms Keene: As with the Ombudsman—although again I am not quite sure whether most of the public takes in the difference—it certainly helps, and it is underlined, that the Information and Privacy Commissioner is an officer of the Legislature as opposed to an arm of government in the other sense, such as a government ministry, and makes a report to the Legislature, I suppose, similar to the Ombudsman. I must say

so far we have not had a great deal—as a matter of fact I do not believe we have had any—feedback from the public that we are perceived to be anything other than unbiased. At this point, I do not know that there is a perception difficulty in any way. I do not know whether that is because people know he an officer of the Legislature or whether it is just the way we present ourselves.

The Chair: To what extent has it been difficult to pull together this type of person who is doing the mediation inside government? The reason I am asking the question is a number of people have recommended that in the area of alternative dispute resolution the government might very well lead the way in terms of its dealing with third parties outside of government. There is a lot of contracting that is done between the government and third parties. There are a lot of disputes in fact which take place between various ministries, between various senior management in the ministries. The suggestion has been made that, using ADR techniques or mediation services internally and also between the government and parties outside, a lot of conflicts can be resolved quickly and at very little expense. Do you see that this experience you have had here in this particular ministry could serve as any way of an experience for that type of process?

Ms Keene: By the way, I should, I think, stress that it is not a ministry. That said, yes, I expect so. Were you in fact addressing the training of people to undertake this task when you mentioned “pull together”?

The Chair: Yes, partly the training and, second, the availability and also, I guess, the efficiency of that type of unit dealing with the public and the government on an ongoing basis.

Ms Keene: Okay. I am afraid I do not think I can comment intelligently on that broader question in terms of the training to mediate between members of the public and government in our context. My understanding of the field is that there is very little available in terms of training. I think that is because it is very, very task-specific. The way you handle a mediation is very task-specific. I think one goes about it in quite a different way when you are mediating, for example, a child custody dispute and when you are mediating something like ours, in which it is a rather narrow question as to whether a section of the act applies. I am sure that it is unusual that many of our officers are lawyers. I am quite sure most people who undertake mediation—at least some people who undertake mediation—are not lawyers. I am sure too that some people feel that

lawyers are not, by training, ideally suited to be mediators.

I think it is a question that the parameters of your task very much dictate the way you do it and the training you need to do it, so that I think you need more legal training or ability to deal with the legislative scheme when you are dealing with the narrow question as to the application of law to facts and you need a different sort of training when you are dealing with whether this parent should get this kid to live with him or her. I am talking about quite different skills, I think.

I am not sure that was a great answer to your question. Should I try again?

The Chair: No, I think that is fine. I appreciate the response. What is the general response on the part of the public to this process? They basically have made a demand of a ministry, or part of a ministry, for information and then they are told in the first instance that there is this mediation-like process. What is the public response to the process?

Ms Keene: I actually think maybe I should backtrack for a minute. They go through a request process at the ministry. They put in a written request for recorded information and they get a written response by way of a decision from the ministry. In so far as the ministry might be essentially mediating in terms of the request, I am not quite sure what would go on regularly on that basis, but it is only when they appeal that they get to us. So if they do not like the decision and wish to appeal it they get to us, and at that point we would try to make efforts to settle. I think that so far it is early days to assess the way the public looks at us and whether it thinks we are useful, although I am heartened by the fact that we settle a great deal. I do not think people settle when they are bitterly unhappy; I think they go on.

I do think that we have not had any great problem, as I mentioned, with anybody thinking that we are other than unbiased. I think that as usual, though, people have a certain amount of impatience with the law. I think they have a certain amount of impatience with complex questions. It seems like a very simple thing to the public: “I want this information. Why shouldn’t I have it?” I think it is hard for them to be patient and to explore a complex question. We do a lot of explaining of the statutory scheme and why this is not such a simple question. Having said that, so far we have received mostly positive feedback about the process. But as I say, it is early days yet, so I do not think we can congratulate ourselves and be complacent.

The Chair: Does the 50 per cent settlement rate satisfy the people, the officials, in your area?

Ms Keene: Yes, we think that is pretty good, particularly in the early days. Many people want to go on to a test case. They want to test legislation. I think many people want to go on and say: "What will the commissioner do for me here? Let's just push this right to the end of the process." So I think there is that militating against settlement.

I do not know what is a good rate, I do not know what is a good settlement rate. I am not sure anybody can honestly tell you that because it very much depends on the field you are in. Frankly, I would love to see them all settled because I am a very big fan of settlement. I think settlement usually means that there is partial gain for everyone. Nobody is bitterly unhappy. There is not an ultimate and absolute winner and loser, the way there can be when it is just cut off, yes or no. I would like us to do more, but I think that is pretty good for the first couple of years.

The Chair: I understand that this particular legislation is going to be applicable to municipalities in the very foreseeable future. I think it is 1991?

Ms Keene: Yes.

The Chair: How is the appeal process going to apply in the case of an individual municipality? Let's take, for example, the city of Waterloo or the city of Ottawa. They are required to be under the legislation and someone disputes some sort of an exemption. How will that apply in the case of municipalities?

Ms Keene: It is very, very similar to that which goes on in the province when you look at the statutes. I should say that the statute does not give us much guidance in the Office of the Information and Privacy Commissioner as to how we handle appeals. There is very little guidance so it is very much a question, and has been, of trying to make up a system, create a system, that is fair, and is perceived to be, and is as efficient and expeditious as possible. It is very much making it up as you go along.

So what we have with the municipalities is a statutory scheme that is virtually identical to that of the province. I suspect that at the beginning we would do well to use just about the same procedures and see whether we have to or need to make adaptations to satisfy the conditions pertaining to municipalities as they might differ from conditions pertaining to the provincial jurisdiction.

The Chair: Just to go on further in that area, your brief indicates here that appeals officers are senior employees with experience in investigation and/or dealing with complex statutory schemes, and many are lawyers. The municipal application includes some very small municipalities. How will the appeals process take place in a very small municipality?

Ms Keene: I think I should note that the appeals officers are our employees. They are not the employees of the institutions or municipalities. They will have freedom-of-information co-ordinators at the actual institution level, if that is what you are getting at, when a municipality could not afford a lawyer or it is difficult sometimes, the staffing of a scheme for municipalities.

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They do not have to. We are affording the lawyers, we are affording the staff for appeals officers. Both at the provincial level and at the municipal level, the province has handled freedom-of-information demands by creating, typically, an office called the freedom-of-information co-ordinator. Sometimes it is a full-time employee, sometimes that is a part-time employee, at various levels, with various training, handling the initial requests.

With the municipalities, what I have heard so far, and we have done some talking to municipalities, is that often the town clerk's office is the office that will handle requests. I think they will vary on who will essentially be the decision-maker who will be their head, in fact as opposed to on paper. Sometimes it is going to be the entire council, sometimes it is going to be someone delegated by the council to actually make the decisions, but I have certainly seen and heard in various meetings that employees at the town clerk's office, or the town clerk himself or herself, are essentially using their existing staff, I think until they see what the demand is like and whether they do have to add staff to cope with requests. Of course, they get many more requests than we get appeals or we are in serious trouble. Typically, we only get about one appeal for every 10 requests. I think that is how it is running.

Mr Villeneuve: As 1991 comes near and we will have this freedom-of-information available to municipalities, could you paint a scenario for the committee here as what you see would be a typical request from a municipality to you that would go through without any problems, and then paint another scenario where it may wind up on your desk being appealed?

Ms Keene: I will do my best, but I am speculating like crazy. Let's see now. I should say that if a request goes through without problems, our office will never see it.

Mr Villeneuve: And what might that be?

Ms Keene: In a municipal context?

Mr Villeneuve: Yes.

Ms Keene: "I want to see the minutes of a public meeting held on 14 October about sewers in X part of the municipality." They say, "Okay," and hand it over, "20 cents a page photocopying and it's yours," or "20 cents a page photocopying and we've made some severances of certain material."

Severances, by the way, is a concept within the act, because both acts mandate that the government, municipal or provincial, shall give to the requester as much information as is not exempt. So if a record has a bunch of pages and some of the information is exempt and some of it is not, they go over it with a black pencil over the stuff that is exempt and release that which is not exempt.

Many people get severed records and they are content with that. It has given them as much as they needed to know. They are not going to take it further to an appeal. Many people also get a response that, for example, "We have no such record," and they are content. Many people get, "Okay, here's your record in whole," "Here's your record in part," "I'm sorry, we can't give you that record at all because it would breach somebody's privacy," and they are content.

As I say, we only get, so far, about one in 10, regardless, really, I think of the reply. Sometimes people receive a no, as it were, and are okay with that. They receive a no, they receive an explanation of the no—you know, one of the things that most people can understand, for example, it makes sense to them that what they have requested might be personal information about someone else and the municipality or the province writes back and says, "Sorry, this is personal information about someone else and you can't have it." Many people say, "Okay." If it is properly explained in a letter, and often it is, the public is content with that.

Okay, change the scenario. For one reason or another—we could take the same record—there is something controversial that the municipality does not want given out to the public in a particular record, for some reason, for some exemption under the act.

Mr Villeneuve: Might that be something that happened in a meeting that was behind closed doors?

Ms Keene: Yes, they have in the Municipal Act a mandatory exemption having to do with in camera meetings very much analogous to the provincial exemption having to do with cabinet records, and that would be very much like the provincial section 12, "No, you can't have this part of the document, or this document, because it was our version of a cabinet record."

Supposing a person is not satisfied with this response, what I foresee so far—you know, pending any changes we might make because people want us to make changes and it makes sense to do so—is that the same sort of thing happens.

We get an appeal. We assign it to an appeals officer. The appeals officer asks the municipality to provide the record and correspondence and takes a look at the thing. If it is clear to the appeals officer that it was the municipality's equivalent of cabinet records and it is right there on the face of the record and it is quite clear, there would be some explaining done by the appeals officer about the situation and some inquiry into, you know: "Is there anything you want to know that you think might possibly be satisfied by some other document that the municipality might have in its possession? Shall I inquire into that?"

If the person says, "Well, yes, maybe if they've got something else," the appeals officer inquires. Sometimes there is something more general and sometimes you can get a settlement that way. Sometimes it is going to be: "I want it. No matter what you have told me, appeals officer, I'm not satisfied that I shouldn't get this record and I'm going on to the commissioner for a commissioner's decision," and that is the end of the matter. It goes on to the inquiry and there is a decision yea or nay.

Mr Villeneuve: Getting back to the municipality in question, and it may have this in camera meeting or whatever and it may have specified that it be confidential, what is its say at this stage of the game as to the release at your level of that so-called confidential information that it deems confidential?

Ms Keene: They have already refused when it gets to us, so they said their say right then.

I have not talked about the inquiry process. You see, with the mandatory exemption, it is sort of hard to say, "Well, could you change your views?" It is not a question of changing their views. That is a discretionary exemption. So we do not go into that sort of thing. If the requester appellant is adamant, "I want that record, nothing else will do," and the institution says, "It's a mandatory exemption and it applies," it is

going to go on to the commissioner for a decision.

What happens at that point, by the way, is that a report is written up by the appeals officer which outlines the issues on the appeal to prepare the parties for making a representation to the commissioner in a decision-making capacity as to whether finally this thing will or will not be disclosed. The municipality, along with the appellant and anyone else involved with the appeal, gets to make representations to the commissioner. The commissioner has the final power of decision. There is a judicial review possibility if any of the parties does not like the decision, but otherwise the commissioner has the final power of decision.

Mr Villeneuve: So the municipality, from what I see, when this becomes law in 1991, will not have a great deal of discretion once someone has requested this information. They will state their case and basically that is it as to whether it should or should not be public.

Ms Keene: That is a way of looking at it which—if I may, as I mentioned, a lot of people will be told and stay told. It is surprising. They really will. So when the municipality writes a letter, particularly if it includes some courteous explanation, “Sorry, Mr So-and-so, this was a matter that was dealt with in a closed-door session, in an in camera session of council; here is the mandatory exemption in the act; you’re not going to get it,” it may seem surprising, but sometimes people will say, “Well, okay, that’s the way it crumbles.”

Mr Villeneuve: And that will be primarily where it is involving individuals, personnel, this type of information. Could you just give us a bit—

Ms Keene: Whatever municipalities have. I do not think I would be so bold as to comment on when and why municipalities go into in camera council matters.

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Mr Villeneuve: Some do more than others.

Ms Keene: Sure, I know. Many municipalities say, “We’ve got nothing to hide, everything’s public.” Some have a great deal more of the in camera sessions, but whatever it is, if it is properly an in camera session, if it falls under that mandatory exemption, well, that is the way it goes.

Mr Villeneuve: A couple more questions. It involves where you now have experience on a personal basis. Could I go to you people and say I want all of the records that you have on me, personally, me, an MPP or a farmer, at this stage

of the game? Do you run into snags there where for whatever reasons you cannot divulge?

Ms Keene: Very little. Once again, it is not to us that they come. At the request stage they go to a ministry, a department of government, and from my understanding of the statistics to date, there is not a great deal of refusal. When you are asking for your own personal information, it is rarely refused, and it is not charged for either. You make your request to the Ministry of Transportation, to any of the ministries, “What have you got on me?” Rarely is that refused. Usually people get their information and then they can correct it or whatever else, which is usually why they are asking.

Mr Villeneuve: I guess there may be a lot of requests that, because they go through without a hitch, we never hear of them.

Ms Keene: And I never hear of them, yes.

Mr Villeneuve: I guess I would probably get about the same amount of feedback on refusals. For example, if someone has received welfare in the past for whatever reason and has possibly paid that welfare back or whatever, there seems to be some resistance at this stage of the game to provide this individual with information.

Ms Keene: Typically, welfare is a municipal matter, so the records will be in municipal custody and control. Since the act is not yet applied to municipalities, they are on their own. They can do what they wish to do. We sort of are not on the scene, and the act is not on the scene, until 1991.

Mr Villeneuve: This is my last question. Do you run into problems with individuals looking for their medical records?

Ms Keene: We have very few such appeals. I do not know that we have had even one, which speaks to me of the probability that, when they ask, they are given their own medical information.

Mr Villeneuve: Thank you.

Ms Keene: The ones that are contentious is for personal information on the record about more than one person. There you can see that there are some conflicts. Sometimes those go to appeal, but I think typically the experience is that if you want your own personal information, you get it, which I think is a great thing about this act, and a thing that people appreciate.

The Chair: Mr Kormos, you have some questions?

Mr Kormos: Yes. It is undoubtedly appropriate, although at first blush contradictory, that

freedom of information and protection of privacy should be dealt with in the same legislation. As I say, the two are conflicting principles; the two are conflicting interests.

Ms Keene: In a manner of speaking, yes.

Mr Kormos: But I say that the appropriateness of them being in the same bill is that were they in separate pieces of legislation and were the interpretation of one part not—if it could not be done as it can be done now in light of the whole bill, one could find conflicts of laws rearing its ugly head over and over and over again.

At the same time, this committee has discussed dispute resolution, but it has spent precious little time discussing dispute or conflict avoidance, and I think that is really an interesting sort of thing. I know it came up in some of my questions talking about creating social models, institutions, which are designed to avoid conflict, which are designed to avoid dispute. I thought of the models and the incorporation in most social democratic European countries of industrial worker-management models, industrial democracy where workers have a say and have a voice and have a presence on boards of directors, for instance, where labour strife is all but eliminated by virtue of this high level of co-operation, remarkably a level of co-operation in a model that has not been utilized in North America, certainly not here.

I find it interesting that you are here today, and I appreciate just normal scheduling, in view of what transpired earlier this week with the Metro Toronto Police Force and a press conference designed, not to use the media as a conduit, but to use the media as the end subject and end object matter of the message.

The police, as you probably know, expressed a view of Bill 49 which was a very onerous interpretation, a very conservative—no offence intended, Mr Villeneuve—interpretation of their obligations under the act. Dispute conflict arose immediately, not only with the press, who said, “My goodness, the police are interpreting”—and again, the police doing so without malice, because they indicate, as they should, that they have received advice from their own counsel, but the police indicating an interpretation that would enunch the press in terms of reporting crime, in terms of performing a valuable function.

I remarked on that because I recalled being in committee when the police concerns were expressed and there was virtually unanimous opinion about the need to control access by criminals to police records that would divulge the names of informants, that would divulge the

identities of potential witnesses. I mean, of course not. The American experience was brought forward to us to illustrate that indeed in the US underworld types have killed informants and to get the information about the informant they filed normal freedom-of-information applications. So surely it was clear that nobody wanted the legislation to permit that to happen.

Section 8 of Bill 49, which talks about what law enforcement agencies may decide in their discretion not to divulge, dealt with a series of things, and it seemed to be very specific. I guess that is in contrast with section 31, which is those things which ensure privacy, which tend to be very general.

What I am leading up to is that the police clearly have a view of their obligations under this bill which is disparate—broadly disparate, incredibly disparate; bears no resemblance to what was discussed here in committee and in the Legislature. I find that of great concern, because we in the opposition co-operated with the passage of this legislation with an understanding as to how it was going to apply and with a clear understanding that it was not going to interfere with the rights of the fourth and fifth estates—in no way, shape or form.

Indeed, citizens’ groups came before the committee to talk about the need for people in a neighbourhood to know that there have been crimes committed, to talk about the need for people in a neighbourhood to know that there have been break and enters so that they can defend themselves, the need for women in a neighbourhood to know that there have been sexual assaults, and information about the suspect, not a name, but information about the suspect so, again, these women can defend themselves, as is their right.

This is where I get down to dispute or conflict avoidance. The police are clearly taking the most conservative approach so that they can cover their tail, if you will, so that they are not going to have any exposure at all, and you cannot blame them. My goodness.

Why would there have been no directive issued, not just to Metropolitan Toronto but to all those police forces across Ontario, Niagara region being among the top five or six in size, but to the small police forces in small communities across Ontario, telling them what indeed their obligations were under the act? That could avoided this conflict, this dispute, that has arisen in this week alone.

The Chair: If I can interject, perhaps to assist the witness a bit, I might say the witness was not

really invited to discuss the overall policy and perhaps did not inform herself on some of the implications of the questions that you have indicated, because they may not be right on point as to the testimony.

Mr Kormos: That is why I was so lengthy in my preamble.

The Chair: I would just say that I would understand if there might be some reticence to express opinions on those major policy areas.

Mr Kormos: Again, Ms Keene, I do not want to put you on the spot and I do not think I am, because you are obviously a very capable person. The chairman might be interpreting my comments as something of a critique of the government. If he is interpreting them that way, he is dead on, because I think there was some negligence on the part of the government here which gave rise to this, but it creates an interesting context in which to discuss this topic of dispute or conflict avoidance.

1210

You talked about people in municipalities, ratepayers. If they do not have a clear understanding of what they are and are not entitled to get, there are inevitably going to be appeals. If they have a clear understanding, the number of appeals is going to diminish.

So here in this case, there has been conflict already. One representative of one newspaper left the press conference, according to the press, hollering out the classic "I'll see you in court," in response to what the police told him. Why would the government have not issued a directive to police forces telling them what their obligations were under this legislation to avoid this?

Ms Keene: I think, Mr Kormos, I cannot answer your question directly. I can say that I think you are spot on about the necessity of public legal education. With any legislative scheme at all, would it not be wonderful if we had perfect education and understanding among the public, the government and everybody about what the law is and how it applies? Indeed there are fewer disputes when people are clear about what the law is and how it applies.

I should say that there have been and are educative efforts going on at this present moment of municipalities, municipal users, largely spear-headed by a particular office under the aegis of Management Board of Cabinet, so they are in fact ongoing.

I think I should say too that, whenever there is a new piece of legislation, everyone worries about how it is going to have an impact on his

operation. Sometimes they worry aloud, sometimes they do not worry aloud. Either way, certainly in this context, there are educative efforts ongoing. I think we will see more and there will be a result of that, there will be a result of the educative efforts. I wish we all had a magic way of getting complete and wonderfully effective educative efforts done three years ago, but that is always less than easy and less than possible.

Mr Kormos: Have you read the press reports of those press conferences?

Ms Keene: Yes indeed.

Mr Kormos: Do you agree with the police interpretation of their obligations?

Ms Keene: That is one on which I think I will have to decline to answer. I think it is a very complicated question and I cannot get a very clear idea of what they are saying from reading the press reports. It is all very conflicting. They appear to have a concern, and I am not entirely sure what the concern is.

One thing that is easy to mix up is the very thing you mentioned when you were talking about this, the difference between information that a crime has been committed and names of victims and alleged offenders. They are two different things. I think no one is claiming that information cannot be given; for example, there has been an assaulter in a particular neighbourhood. No one is claiming that, thank goodness. That would be way off.

I think what they are doing is grappling with the question of privacy protection and freedom of information, and that is an ongoing dilemma for everyone, that is an ongoing exercise for everyone. I think there are educative efforts ongoing and that they will probably bear fruit so that people are reasonably contented before the act comes into place for municipalities.

Mr Kormos: Is there going to be a specific response by the government from your office, Management Board or through the Solicitor General to the issues generated as a result of this press conference this week?

The Chair: I think that is an area of government policy that this witness really cannot respond to.

Mr Kormos: If she does not know, she can say so. If she does know, we would like to hear it.

Ms Keene: I am sorry. I do not know.

Mr Kormos: Okay. When you talk about your perception of the police concern, are you suggesting that they do not seem to be very clear

in their understanding of their obligations under Bill 49?

Ms Keene: Oh, not at all. It is just that all the newspapers reported slightly differently, and when you are looking to find the actual details of the thing, they vary. So I think it is difficult to get a grasp without actually sitting down and talking to people who are being reported in the press about specific details of their concern. The general concern is clear.

Mr Kormos: If in fact legislation as it is drafted and passed does not reflect the intention of the Legislature as expressed by committee and during the course of legislative debate, is it not important to address that immediately, with amendments, for instance?

Ms Keene: As a general proposition, I think that the question of legislation not addressing the intention of the Legislature, as evidenced by reports of debates and the legislative process, is addressed all kinds of different ways; among other things, in appeals and decisions by the commissioner. It happens with all kinds of legislation in the courts and so on, and indeed by the amendment process. So I think that is a rather multifaceted question.

Mr Kormos: In that regard then, do you, as the director of appeals, and in view of the fact that this legislation is going to become effective in January 1991, have a perception as to what, for instance, sections 8 and 31 mean and how they would be applied in some obvious given circumstances?

Ms Keene: Oh, dear; that is a tough one to answer. As director of appeals, I think I have to say that we go on a case-by-case basis. This is common with systems of law. Until a question gets before the commissioner at the inquiry and the commissioner makes a pronouncement on it, there is no word on what this section means. Often we are waiting quite impatiently: Would it not be nice to have a clear and comprehensive definition of what a particular section of the act means?

Often, by the way, that does not happen until, say, eight or nine decisions of the decision-maker, whether it be a judge or, in this case, the commissioner, because a particular section of the act has all kinds of aspects and all kinds of questions. I do not think, for example, that all of the possible questions that could come up under protection of personal privacy—I must say that, as a lawyer, I do not think the last word could possibly be said for years, because there will be another twist with every appeal.

Mr Kormos: Except that my understanding is that most commissioners, and perhaps yourself included, do not regard themselves bound by stare decisis, by previous decisions, as compared to—

Ms Keene: That is correct.

Mr Kormos: —perhaps guided.

Ms Keene: Bound, no.

Mr Kormos: How does that create any sense of certainty or predictability among the public?

Ms Keene: I think that most administrative tribunals, and I venture to say all administrative tribunals, while not bound by precedent as a matter of law, like to be consistent in their approach and wind up being consistent in their approach because most administrative tribunals know that part of their function is to give the public the interpretation of a particular piece of legislation. For that reason, while not unable to depart from a previous decision—sorry for the double negative—they maintain consistency in approach.

Mr Kormos: I appreciate that. The reason why I find that of interest is that if the tribunal is not bound, how then is the municipality or the police force, unlike a lower court, which is bound by the decision, at least of a Supreme Court, and there is some confusion about whether—in any event, at least the way a lower court is. If a tribunal is not bound by its decision, how then is a municipality or a police force?

How does the community have confidence? Once the commissioner makes a decision saying, “No, Metro Toronto Police Force, relax, this is not what the bill requires you to do,” Metro Toronto Police Force, in so far as I understand it so far, can say: “Yes, we know they said that. So what?” Because your decision is not binding upon yourself as a body, it surely then is not binding—in that one instance, they are compelled to produce it, but the next day, the same scenario or an analogous scenario can arise and they can say no and somebody can say: “Well, no, you don’t understand. The commission said, ‘So what?’” Because the commission itself is not bound by it, how then is the police force or municipality?

The Chair: Just by way of information, I am not trying to reduce the number of questions, but we are five minutes over the allotted 45 minutes for this particular witness.

Mr Kormos: Thank you, Mr Chairman.

Ms Keene: I think I have to revert back to my previous answer. As with all administrative tribunals, generally speaking, when you have got

a decision, everyone does rely on it because they know and they govern themselves accordingly. When commissioner's decisions come out, administrative tribunal decisions come out, the persons involved in the disputes do govern themselves accordingly because they know with some confidence that there will be an element of consistency maintained. There will not be a night-and-day departure from the position undertaken in a decision. The decision is made with a great deal of thought.

I suspect that the only reason underlying that rule of administrative law that a tribunal is not bound by its previous decisions is that sometimes an appeal throws up a different aspect of the question, that is all. But as I say, the consistency of approach is something you can more or less put in the bank with administrative tribunals, and I think that is the case and that has been peoples' experience.

Mr Kormos: With respect to the last little bit, in view of the fact that you have some concerns about what was expressed by Metro Toronto Police and the response by the media, and I understand that to be the case—

Ms Keene: Actually, I do not have concerns in the sense of being worried about it. I think that it is predictable when people are considering the impact of legislation that they will ask questions and worry out loud. This is a predictable part of the process.

Mr Kormos: You have merely observed then that they worried out loud. Do you have any plans to respond to that in any way, not necessarily to the police force in Toronto or to the press in Toronto, to the media in Toronto, but to any government ministry or within your own body?

Ms Keene: I am sorry?

Mr Kormos: Do you plan to respond to that in any way, shape or form?

Ms Keene: It is not my job. That will be for the commissioner to plan and do if he thinks it appropriate.

Mr Kormos: Have you made any comments to the commissioner, with your observations and with your comments?

Ms Keene: Me? No.

The Chair: I want to say I certainly appreciate the principle of conflict avoidance which Mr Kormos has raised. Certainly a good place to start with conflict avoidance would be within

governments, in the provincial government. I am sure that that principle of conflict avoidance would certainly extend to all members of legislative committees as well, and I am sure we will all take note of that.

Mr Kormos: Mr Chairman, I should note that you are quite right and it is remarkable how a minority government can create an air of conflict avoidance. We need another one real fast in this province, and I appreciate you saying so.

Interjections.

The Chair: I like the way you translate English, Mr Kormos.

Mr Kormos: I am just speaking for the people of the province.

The Chair: Actually, that is a good way to note the adjournment of this morning's session for this nonpartisan issue which we, the committee, have decided to discuss in a very nonpartisan way.

But I do have one final question for the witness, and that is whether or not you can quantify the number of appeals you have had so far. How many per month, or is it accelerating; can you quantify it for us in any way?

Ms Keene: Actually, we do keep statistics on the number of appeals. I am busily trying to remember how many for 1988, 1989 and 1990 so far.

Mr Epp: They were provided to the standing committee on the Legislative Assembly, Mr Chairman. I do not have them with me, but—

The Chair: If you could provide them to us in writing or in some sort of briefing note within the next few days, that would be useful to the committee.

Ms Keene: Oh, definitely.

The Chair: If there are no further questions I would like to thank the witness, Judith Keene, from the Office of the Information and Privacy Commissioner, for being with us. I am sure that her comments will be very useful to the committee in preparing our final report. I am sure she had a number of questions today which she was certainly was not anticipating and I thank you for your co-operation.

Ms Keene: Thank you very much.

The Chair: The committee is adjourned until 2 pm this afternoon.

The committee recessed at 1224.

AFTERNOON SITTING

The committee resumed at 1434 in room 151.

The Chair: The standing committee on administration of justice is continuing its hearings on the issue of alternative dispute resolution.

MINISTRY OF THE ATTORNEY GENERAL

The Chair: This afternoon we have back with us Michael Cochrane from the Ministry of the Attorney General. He is in the policy development division and has also been chairman of the Advisory Committee on Mediation in Family Law. Mr Cochrane was before the committee last week. He was asked to come back here to answer some additional questions. There are one or two of our committee members who are not here and hopefully they will be back in time to continue any questioning.

In the interim, we had a number of other witnesses come before us, and in particular we had a submission on behalf of the Ontario Association of Interval and Transition Houses. They had some very serious concerns about mediation in the family law context and I would like to draw your attention to their conclusions, which I will read. They are very brief. Then I will ask you to comment on those conclusions in relation to your particular report.

The conclusions they came up with are as follows:

"We recommend that before any form of alternative dispute resolution is considered for legislation the needs and safety of the battered woman are examined more seriously and that the following questions must be answered to the satisfaction of the victim herself and her children:

"1. Does it provide protection for the victim?
"2. Is it effective in stopping further violence?
"3. Is there a balance in bargaining power?
"4. Does it act as a punishment or deterrent?
"5. Does it interfere with the criminal justice process?

"6. Does it interfere with the victim's rights?
"7. Are all services adequately in place, such as supervised access, to ensure the safety of the woman and her children?

"8. Is enforcement of agreements available?
"9. Are all those involved in an alternative system aware of the issue of wife assault?

"10. Is the alternative merely a cheaper solution to the complex problem of our court systems?

"11. Who really benefits from this alternative?"

As I mentioned, there was very serious reservation on the part of this particular group and the presenters who made the brief. They directly referred to your report as perhaps not properly answering some of those questions in your recommendations. Could you comment on that. Take as much time as you need.

Mr Cochrane: Thank you to Susan Swift for providing me with a copy of the conclusions from their report. Just so we understand each other, I have not seen this submission. This is the first time I have seen these conclusions but I think, just having heard you read them, that I can probably comment on each of them vis-à-vis the report's recommendations, because in fact many of these concerns were considered during our work.

Maybe I can just begin on page 13 of their brief with question 1, "Does it provide protection for the victim?" I am assuming that question is meant to mean, is it safe for women who come from a background of violence or their children to allow their dispute to be dealt with in a mediation process?

The committee's recommendations on who should be in the mediation process are designed really to set up a screen at the front door of the mediation process to ensure that victims of violence who may have a corresponding loss of bargaining power do not ever enter mediation.

I would say that in terms of the committee's recommendations, what we tried to do as a group was to set up layers of protection on the mediation process that would, for example, screen out victims of domestic violence at the intake hearing by making sure that the staff who were front line in the service were trained to recognize the symptoms of domestic violence, which we are the first to admit were not universally known and understood. But those people should be trained so that they would recognize the more obvious symptoms of domestic violence.

There would be an effort during the intake and the following procedures to ask the question about domestic violence, to ensure that there is independent legal advice, which is another safety valve for this kind of concern, and then again at the stage of reaching the procedural requirement for legal education about mediation and family law that this public education seminar would expose users of the service to the concerns about domestic violence. It would alert, for example, a

woman who came into the service that she should be concerned about, let's say, a mediator bias for joint custody. She should be concerned that if she comes from a relationship that includes violence, she may not be the right kind of person to use a mediation service and so on.

1440

Even beyond that, as you go deeper into the mediation service, there would be the further protection that the mediator himself or herself would be specifically trained to recognize victims of domestic violence, would be alert to recognizing those symptoms, and would point out to clients who would will soon have made it somehow through the first couple of screens that even if they were there to use the mediation service with the mediator in front of them, they would still be cautioned that if they have any domestic violence in their past that would somehow render them incapable of bargaining with their spouse, they should consider some other method of dispute resolution.

Even past that, the committee said that if the mediator was of the opinion that there was violence in the relationship, if he could not determine whether this person was rendered incapable of bargaining with her spouse as a result of that violence, the mediator should still err on the side of caution and tell her that she should not be in the service.

In trying to answer question 1 that was raised, "Does it provide protection for the victim?" I would say that the committee's efforts were to provide layers of protection to make sure that these screens existed at each stage of the mediation process to make sure that persons who were victims of domestic violence did not end up in a method of dispute resolution that was inappropriate for them.

"Is it effective in stopping further violence?" is an important question because it really underscores the need to caution spouses who come from a background that includes violence that there is a need to obtain protective orders. The committee actually commented specifically in one of its recommendations on that point, that in the event one of a couple was identified as being a victim of domestic violence and was told that she was not suited to mediation and the person who delivers that message to her—let's say it is an intake worker—says, as a result of the interview: "You are a person who comes from a background that includes domestic violence. You are rendered incapable of negotiating with your spouse because of that violence and you should not be in this mediation service," that would not be

enough. They would then have to go the next step and say, "You should now go and get your own lawyer and seek protective orders to make sure that the violence does not continue." That is probably the first part of the answer to that question.

The second part is that simply because you are in mediation does not mean you cannot also utilize remedies that are available in the court process. It may be possible and may be recommended in some cases that orders that are of a protective nature, for example, an order for exclusive possession of the matrimonial home, might be called for and that would be one way of stopping even the potential of more violence. So the committee did address that question in its work.

On question 3, just to expand it a little bit, I think what OAITH is driving at here is, is there a balance of bargaining power between the two spouses as they come into the process? I think it is clear from the committee's recommendations that this concern was front and centre during most of our work, to make sure that those persons who came into the service were capable of bargaining with each other.

As I mentioned, I think, in my remarks two weeks ago, that is not just a case of domestic violence. There may be spouses who do not have an equality of bargaining position but there is no violence in the relationship. I think the example I used the last time was spouses where the husband was a business executive and the wife had been a homemaker for 30 or 40 years and was not familiar with cheques and mortgages. That is as much an inequality of bargaining position as someone who comes from a background of violence.

OAITH is quite right that any mediation service must answer the question at the outset, is there a balance in the bargaining power between the spouses?

"Does it act as a punishment or deterrent?" I think this question probably is directed towards the difference between the goals of mediation as opposed to the goals of the court. There is no doubt that the traditional philosophy of using the courts has been that you can obtain orders from the court which are then capable of being enforced, and once they are enforced, through contempt, jail and fines, that may offer some deterrence to a spouse and encourage, as a result, compliance with the court order.

I think what the OAITH is driving at here is, is there a corresponding effect in the mediation process? I would say probably not. However, the

proponents of mediation have said that the corresponding value of mediation comes not from punishing and deterring people, but allowing them to participate in the decision that is being made, allowing them to invest some of their time and energy in the development of the solution, setting up a process that allows them to buy into the solution that they have developed and therefore voluntarily complying with the outcome of the mediation.

They are right that mediation does not seek to punish or deter. It really seeks to empower people and allows them, as responsible adults, to participate in making a decision they can live with.

"Does it interfere with the criminal justice process?" This concern I think arises from a difficulty that was experienced in the United States, where the criminal justice system began to mediate criminal offences involving domestic assault, and that is where a husband was charged with a criminal offence and the matter was coming to court. The American system developed, not a family law mediation technique, but a mediation service in the criminal courts that allowed the husband and wife to work out I think what most of us would agree are really inappropriate solutions.

One that was drawn to the attention of the committee was, a husband and a wife agreed that he would stop battering his wife if she agreed to cook the dinner in a particular way, and as a result of that the charges were taken out of the criminal process. The committee, I can safely tell you, was unanimous that we did not want to see that kind of development in Canada. The concern that I think OATH is raising here is, if you divert spouses into the family law mediation process, will it somehow begin to interfere with the prosecution of a criminal offence arising out of the same facts?

Our recommendation was that there be absolutely no connection between the mediation of the issues between the spouses and the presence and prosecution of criminal charges, and I would just draw your attention to conclusion 18 of the committee which said as follows: "Acts of violence should never be mediated, nor should the criminal or provincial offences noted above"—and the ones that are noted are family law offences and children's law offences. "Such offences should not figure in any way in negotiations or mediation of other issues affecting the family."

The committee's goal was to make sure that if a husband was charged with assault arising out of

violence in the home and the family then went off into the family court system to resolve custody issues, access issues and property division, the criminal charge should never figure in any way in those negotiations. In other words, the husband should never be put in a position where he can say, "If you drop the criminal charges, I will give you certain benefits in the property settlement," or "If you drop the criminal charges, I will forgo my right to ask for access," things like that.

We thought there was a criminal process for dealing with a criminal charge and a family law process for dealing with the family issues and the two should not interfere with each other. So in response to question number 5, "Does it interfere with the criminal justice process?" it should not, because they should operate separately.

"Does it interfere with the victim's rights?" I am not certain what that question is addressing. Certainly, if we are talking about the victim's rights, let's say it is an assaulted woman who has particular legal rights under our family law, rights to a particular method of property division, rights to ask for custody and so on, would mediation services interfere with a person's right to ask for those things? The answer from the committee would be: "Certainly not. What we are trying to do is present through our recommendations just a different kind of forum where the request for the rights could be raised and addressed in a nonadversarial environment."

1450

"Are all services adequately in place, such as supervised access, to ensure the safety of the woman and her children?" Just by way of background, supervised access is a concept that has been available under the Children's Law Reform Act for approximately 10 years. What it means is that the court upon the request of the parties can ask for an acceptable third party to supervise the exchange of the child at the time of access. In other words, the father would drop the child off at a particular location and then the mother could come and pick the child up and vice versa.

It also means a more comprehensive type of supervision in that the actual visit could be supervised, where the father picks the child up at a certain facility and has the entire access period in the facility under the watchful eye of a neutral third party, to ensure that this kind of service is used where there are concerns about sexual abuse or physical abuse, or in some cases where there is a parent trying to rebuild a relationship with the child if access has not taken place over a long period of time.

In any event, are all services adequately in place, such as supervised access, to ensure that safety? Although supervised access was technically not a part of our mandate, it very logically came up in the discussions, and in conclusion 50, the committee said: "Any mediation service established should be encouraged to play a significant role with respect to access to children. Services of any facility should include the provision of a place for supervised access or supervised custody and act as a pickup-dropoff point for access visits."

The committee thought of this and definitely saw a role for supervised access in the mediation service. I think it was the wish of the committee members that, in the event mediation services were provided around the province as they were provided in a community, it would also provide an opportunity to provide supervised access facilities for that community and we would therefore be meeting two needs at the same time.

Are the services adequately in place? I do not think there is anyone in the province who would say that there is enough supervised access now. It is a mix of public and private. When it was initially put into this Children's Law Reform Act, it was not anticipated that companies, associations or groups would get together to provide this as a community service. It was more the thought that you would have someone like a neutral family member supervise the access for free, perhaps a rabbi or a teacher who was acceptable to both the parents. What arose over the last 10 years, in some communities people got together and decided that they would deliver this as a service. As I say, the committee's goal really was to try to meet two needs at the same time, to provide mediation services and supervised access services together, and we are probably in agreement with the OAITH on the need for those.

"Is enforcement of agreements available?" The question I think is, in the event an agreement is reached through mediation, is it then capable of being enforced? The answer is yes because the agreement that is produced is like any other domestic contract, provided it meets the technical requirements of the Family Law Act; that is, it must simply be in writing, signed by both parties and witnessed. Once an agreement meets those requirements, the provisions of the Family Law Act and the more recent provisions of the Children's Law Reform Act allow those agreements to be filed with the court and enforced as if they were orders of the court. So enforcement of agreements would be available.

"Are all those involved in an alternative system aware of the issue of wife assault?" One of the key recommendations, I think, that the committee has made is that anyone who was involved in this system should receive specific training in the area of domestic violence to be able to recognize it, to be able to confront people with what their feelings are about the presence of violence and to steer them, if appropriate, out of the mediation system in the traditional adversarial process.

"Is the alternative merely a cheaper solution to the complex problems of our court system?" I do not think the evidence is conclusive one way or the other about whether mediation is more expensive or less expensive. The only thing there seems to be agreement on is that people are happier having gone through it. I would say that certainly in a government's search for different ways of delivering dispute resolution, cost is a factor, but it is not a determinant one at this stage.

"Who really benefits from this alternative?" I would say this is probably the most important question of the group because really what it has zeroed in on here is, whom is mediation for? The comments I made the last time I was here were that that really is the thrust of the committee's recommendations, to find out, to develop a system that allows mediators, intake workers and lawyers to screen out those people who are inappropriate for mediation and to attract the best candidates for mediation, people who have equality of bargaining power; people who have not been rendered incapable of bargaining with each other because of a history of violence; people who are there voluntarily; people who, because of a procedural requirement for legal education, have been told what their rights are; and people who understand that as responsible adults they are able to participate in the decision that is going to affect their family, invest some of themselves in it, and recognize that in doing so they are more likely to comply with that agreement. So if you could take the ideal candidate for mediation as I have just described him, that is the person who is going to benefit most from this alternative.

The Chair: Several of the committee members came in in the course of Mr Cochrane's response to the previous question. Just to update them, Mr Cochrane was asked to comment on the 11 questions which were contained in the conclusions of the brief submitted by the Ontario Association of Transition Houses. Mr Cochrane has just completed his answer to those questions, but that does not preclude the members who

arrived late from I guess pursuing those questions again in some detail.

But I have an additional question, and it relates to the submission yesterday from the Family Law Reform Coalition in the person of Mary Lou Fassel, who is the director of legal services with the Barbra Schlifer Commemorative Clinic. She was, I guess, to be kind, not very complimentary to the recommendations and the conclusions in your report. In particular she raised the issue of dissents that were noted by the Ontario women's directorate. She indicated that out of 10 recommendations, the Ontario women's directorate dissented on six of them.

I am just looking at your brief here. I note that you have described what appear to be 52 conclusions and there appear to be nine dissents of those 52. So perhaps, before I get into my general questions, are these conclusions deemed to be recommendations and are there six dissents to 10 recommendations? Could you just clear me up a little bit on the numbers game beforehand?

1500

Mr Cochrane: I do not know whether I could help you with the numbers because I have not actually added them up in the way that you have mentioned, but the committee reached 52 conclusions that take the form of recommendations about what should be done in family law mediation. There are a number of conclusions that have been identified with an asterisk. If you can just give me a moment I will see if I can count them.

The Chair: There are nine.

Mr Cochrane: You are right, nine. Just to be fair to the women's directorate, because there was, you can appreciate, some discussion about the form of the differences of opinion, none of the committee members who expressed opinions different from the committee's conclusions—it was not just the women's directorate. For instance, Fran Kitely, one of the lawyers on the committee, expressed a different opinion about a particular conclusion. No one wanted her opinion characterized as a dissent. That word does not appear in the report, to my knowledge. In fact, how they are being characterized is that there were just differences of opinion on the direction that could be taken in certain areas. The important ones that I think you are referring to are the ones around domestic violence.

The Chair: If I might, just looking at your report here it indicates that, "This is to indicate that the Ontario women's directorate does not agree with these conclusions." It refers to nine

and it does, I think, essentially deal with family violence.

Mr Cochrane: That is right.

The Chair: In the case of the people who presented the brief for the OAIH and in the case of Mary Lou Fassel from the Barbra Schlifer clinic, they were quite critical of your report in particular saying that it did not account for the legitimate concerns that women have in the area of family violence and that they thought there was significant risk to women in the mediation process and the recommendations coming out of your report. I wonder whether you have any comment on that.

Mr Cochrane: Let's take it in two parts because, as you have framed it—and to be fair, again, I did not hear their submission—you have described it to me as being that our report did not deal with the concerns and that if these recommendations were implemented, there would be significant risk.

On the first score we just part company. The report has an entire chapter devoted to concerns that women have about mediation and family law.

The Chair: I might say they describe that chapter as being naïve, insensitive and not in touch with the modern world.

Mr Epp: Who had input into that chapter?

Mr Cochrane: That is a good point. I was just going to say, who had input into the chapter? The committee's report was written by everyone. It is a consensus document. The dissents, as you characterize them, the differences of opinion, were written by the authors themselves. If someone did not agree with a particular point, he or she was invited to write his or her disagreement and include it, so the inserts that you see in the report that deal with differences of opinion on domestic violence, for example, are written and are not edited by the balance of the committee. That is a verbatim quotation from the person who had a difference of opinion.

Whether the chapter is naïve and the other pejoratives that are applied to it, I will just take a minute to remind you about who is on this committee and whether these people strike you as being naïve. Phil Epstein is head of the family law section for the Law Society of Upper Canada bar admission course—he was on the committee; Roger Timms was at the time one of Ontario's family law commissioners in Toronto and has probably seen more family law work than most of the senior practitioners in the province; Judge Van Duzer is one of the senior judges from the

Unified Family Court in Hamilton; Dr Peter Jaffe is a well-known and very well respected mental health professional who is involved in custody, access and mediation issues; Judith Ryan is a lawyer and a mediator and is probably the most highly qualified mediator in the province; Molly Knowles is the head of the mediation service in Kingston, one of the original services for the province; Fran Kitley is a well-known family law lawyer in Toronto who did not hesitate to express her opinions throughout the committee's 18 months of work. So if somebody feels that chapter is naïve, I think he has an uphill battle, given the group that wrote the report.

The Chair: Let me ask a supplementary question to that. How do you react to the obvious reality that the Ontario women's directorate—which, I assume you would agree, is a fairly credible group—would not agree with nine very significant conclusions of your report? What is the significance of that to you? What is the significance of that to the women in the province of Ontario?

Mr Cochrane: I would say the significance is that there was a certain point at which the women's directorate and the other committee members parted, and that was the question of the presence of violence. It is dangerous to oversimplify something as important as domestic violence, but I think the conclusion was, what if there were one act of violence in a marriage? If someone were a victim of one act of violence, should she or should she not go into the mediation service? The answer from the committee members, other than the women's directorate, it is safe to say, was: "It depends. If the violence rendered her incapable of negotiating with her spouse, then she should not go into the mediation service." I think, on the women's directorate side, to be fair to them, they said: "That's a dangerous game to play. If you start evaluating whether it is one act of violence or two acts of violence, you get on to a very slippery slope that makes you look at violence on a sliding scale." That is really where we started to—when we see a difference of opinion on some of the conclusions.

The other thing you should be careful of, I think, on difference of opinions is that—for example, something like the procedural requirement for family law education. The difference of opinion there was not that people should not receive more information about family law or about mediation in family law, but that it should be required at the outset; that it might actually be an obstacle to keeping people out of the family

law system. So, while there is a difference of opinion about the conclusion, the goal of public legal education is shared by everyone, including the women's directorate.

Your more general question, though, I think is the most important one and that is, what do women in Ontario have to worry about or be concerned about in this report? I would say, if the committee's report is implemented, and the conclusions are read the way they are designed to be implemented as a part of a mediation service, women in the province have nothing to fear because this model is designed to be a sophisticated screening mechanism to make sure that mediation services are available for those who want them; for those who are quick to deal with their spouses or are quick to negotiate with them. And it is available for spouses who want to put, in some cases, all the issues on the table—in other cases, only a few.

It is not for everyone; no one has ever said that mediation is for everyone. But I think women in the province should probably feel, first, that the Attorney General was very astute in the way that the committee was structured, because he made sure the committee had in front of it, from day one, the concerns that women's groups had about mediation. Second, they should recognize that the committee really worked overtime to make sure that any mediation service that was delivered in the province in accordance with these recommendations at least protected those who come from a background that includes violence.

The Chair: To what extent do you think the fact that the Ontario women's directorate disagreed with nine of your conclusions, essentially in the area of violence; does that really undermine the credibility of your report and the likelihood of acceptability of the recommendations and family mediation, particularly where there has been family violence involved? To what extent does that really undermine the credibility of your report?

Mr Cochrane: I do not think it undermines—I mean, it is naturally a concern that we were not able to be unanimous. In fact, I think the surprising part is not that we were unable to achieve unanimity on every issue; the surprise really should be that we achieved so much unanimity. There are 52 conclusions there. There are some pretty sweeping conclusions and there are some very specific recommendations for the way the model should be delivered. It is remarkable that this group of people was able to get together the way that they were.

Does the document suffer a fatal lack of credibility because of that? I do not think so. I think, if you read the recommendations closely and it is implemented the way that it is recommended, it is a good report. It has been very well received worldwide.

1510

The Chair: What you are saying, then, really, is the Ontario women's directorate in fact agreed with 43 of the 52 conclusions?

Mr Cochrane: The concern is that the disagreement centres around that one issue of family violence. As I say, there is—

Mr Jackson: No. It is in the report, Mr Chair. If you are leading the witness, then you should remove yourself from the chair to do that. Hopefully, in your special position in the chair, you would not leave that conclusion. Or am I to challenge the Chair? I can challenge a deputant, when it comes from him. But I will take your guidance on that.

The Chair: I will take your point and I will just ask the witness to comment on the fact that there are nine, I guess, points at which they do not agree, and he had already previously indicated that they were in the area of family violence. And that is what I thought I was addressing.

Mr Jackson: That is your opinion of his reading of the report. But for you to—

The Chair: I am asking him the question and I would assume you are next on the list to ask questions, and certainly you are free to ask questions.

Mr Jackson: I just wanted to make sure I ask them of the deputant and not just you.

Mr Cochrane: You might be right. I think Mr Jackson's point is that all nine do not deal exclusively with domestic violence. In fact, one deals with public legal education and access to the justice system itself. Many of them deal with domestic violence and some do not.

Mr Jackson: Thank you.

The Chair: I have no further questions in any case, Mr Cochrane. I believe Mr Jackson is next.

Mr Jackson: You mentioned the worldwide acceptance of your report, the worldwide interest. I guess it is a catch phrase, as we hear frequently from the government, "world class"—you know, the buzzwords that are used extensively by the government of the day. We were apprised that there may have been limited circulation of this report within Ontario. Could you explain to us exactly your understanding of

the circulation of this document, the Report of the Attorney General's Advisory Committee on Mediation and Family Law? Who received copies of this in Ontario?

Mr Cochrane: Let me tell you a little bit about how documents like that are distributed. I recall that the initial request for printing was at 2,000 copies of the report and there would be a certain number of French language copies. I think there may have been 200 or 300 French language copies; if that is a part of the 2,000 I am not sure.

What we did when it was close to the time it was going to be tabled in the Legislature which, if I remember correctly, was in May of last year, May 1989—what we try to do is target those groups that are most interested in the report and send them out a copy, by courier if necessary, at the time the report is tabled. I remember back in May 1989—

Mr Jackson: Michael, I am sorry to interrupt you. We are very familiar with the process of circulating documents and the delays in bilingual translation. We are very familiar with that as legislators. I asked you a specific question: who got this report? I am not really worried if they got it by courier or by pony express or by regular mail. I want to know who got this report in Ontario.

Mr Cochrane: My memory on the point is that there were about two or three dozen mailings that were made immediately at the time it was tabled. The point I was going to make was that there was a little bit of confusion about when it was going to be tabled, so there was a delay of getting it out to the—

Mr Jackson: That is not uncommon.

Mr Cochrane: After that, whoever asked for a copy got a copy. I checked three or four months ago and I believe they had sent out approximately 1,300 of the 2,000 reports. If anybody wanted it, we mailed it to them. I know from my own recollection at the time, because I had a hand in some of the mailings that went out at the beginning, I believe Mary Lou Fassel from the Barbra Schlifer Commemorative Clinic, received a copy. I believe Trudy Don from the Ontario Association of Interval and Transition Houses received a copy.

Mr Jackson: In fact, your point yesterday was that, to their knowledge, they were the only two recognized women's groups in Ontario that received specific copies in that first mailing of 24 or 30 copies. That was information shared with the committee yesterday. Generally, it confirms her concerns with terms of gross numbers. But

specifically, it would strike me if, in the knowledge that there was this controversy with women's organizations, which are well documented by the government, when they are giving out rape crisis centre funding in this province, they have a mailing list of 2,000, but when dealing with the rather sensitive matters of fundamental change in mediation and family law, they seem to only have 25 copies. So, I wanted you to respond to that, because it was a point of concern.

To put it in more perspective, as the chairman inquires from you of the reaction of just, say, the women's directorate, there may have been more responses to this committee had the report been better circulated in sufficient time. We also have concerns in so far as this committee, by invitation, invited people to come and deal with mediation and family law matters. So, we have a process where there is some doubt as to how well the document has been circulated for the public to understand it better, to digest its contents, to think about them and then react in a consultative mode with an all-party committee here in the Legislature dealing with a fundamental justice issue. And we now find ourselves, a scarce eight months after the report is circulated—the 25 or 30 copies—that we are now dealing with making specific recommendations to the government to proceed. So, you can understand the frustration and the point that we are getting at in terms of how widely circulated the document really was.

My next question has to do with—

Mr Cochrane: If I could just pick up on a point about the circulation beyond the two that we mentioned, I would be very surprised if they were the only two. I can even remember, for example, that the status of women in Ottawa received a copy, because we were interested in the national perspective.

The other thing, too, is it is not just mailings that bring this kind of report to the attention of the public. There was a very big meeting in Ottawa, I believe it may even have been in May 1989, where there were national representatives there inquiring about mediation. The fact that the preparation of this report was under way and the fact that it would be available was something that was known across the country.

Mr Jackson: But it was not published and it was not in their hands to discuss in detail. Michael, what we are talking about here is the degree to which the consultative process can work in Ontario if, in fact, people have access to the document we, as legislators, are attempting to respond to. That is all the point I was making. I

suspect that there have been subsequent interests expressed and they have contacted you. But it breaks from tradition when we have a report to get it widely circulated, if in fact the minister wants consultation to occur and to get the feedback. That is my only point.

We have all sat on committees where our reports are widely circulated to encourage public debate and discussion and for us to get feedback. We generally try not to proceed to the next level of implementation until such time as we have heard that. Some of the groups that have come to present the concerns of this brief were invited after the fact, because they were not even that well apprised of the notion that we were proceeding as a justice committee to examine it. That is the only point I was making.

You started to summarize the biographies of each of the participants in the committee and the point was made that eight of the 13 members had a very strong, if not a singular, interest and background in mediation, as opposed to perhaps having some other legal credentials in the treatment of family law matters. That point was made to us. When you went through your rendition, I sensed, as you went through them, you heavily emphasized the mediation background of these individuals. To what extent do you think that had an influence on the committee's report?

Mr Cochrane: The presence of people who are experts in mediation?

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Mr Jackson: An inordinate number of them, I think, is my point, Michael.

Mr Cochrane: I cannot say that I accept the point. An inordinate number—

Mr Jackson: You do not have to accept the point. You just enumerated the individuals five minutes ago.

Mr Cochrane: No, but I am just looking down the list, for example, and I do not think it would be safe to characterize Fran Kitley as having an inordinate interest in mediation and family law, or Phil Epstein.

Mr Jackson: So he is one of the four who probably is not—

Mr Cochrane: Fran Kitley is a woman.

Mr Jackson: Yes.

Mr Cochrane: Commissioner Roger Timms provides a legal service as a part of the Supreme Court of Ontario. The point is not really that there are an inordinate number with mediation expertise or not. What we tried to do is get a group that

was representative of the number of areas; that is, the legal profession, mediation and mental health professions and, in addition, the representative from the women's directorate to make sure that we had all the bases covered.

Now as it turns out, as the invitations were issued, which is not something, you understand, we had control over—

Mr Jackson: You did not, no. I mean, you chaired this committee, but that is the group that you were empowered with to come to conclusions in your report. Okay. I do not hear anything from you that disavows the notion that there is a very strong representation, if not in part or in whole, in terms of the mediation skills and background of this committee.

Mr Cochrane: Absolutely.

Mr Jackson: Okay.

Mr Cochrane: They are the experts.

Mr Jackson: You have addressed the concerns expressed by the women's directorate for the recommendations and I appreciate you clarifying the point that the women's directorate found and identified concerns beyond the very narrow area of just family violence. They had expressed concerns with other elements of the report and other so-called "women's organizations" have indicated their concern with many more recommendations than just the ones identified by the women's directorate. You are familiar with that?

Mr Cochrane: Not the ones that have been addressed to this committee I am not.

Mr Jackson: Okay.

Mr Cochrane: Other than that, I mean, I am now familiar with OAITH, which I do not think are significantly different from the concerns that the women's directorate had. If anything, I think pretty high praise should go to the women's directorate for the job it did in putting this issue before the committee. They did a very exhaustive literature search, presented a very good summary and Donna Hackett, who was the representative on the committee, made a very comprehensive presentation.

Mr Jackson: Michael, you do spend a lot of time lauding the efforts of people identifying the concern. What we do not get as chairman of this advisory committee is your appreciation of the fact that their recommendations did not find their way into your report. I think you referred to the Attorney General being astute for having their concerns covered. Generally I tend to commend the minister who was sensitive and has listened and, therefore, responds to those concerns.

That is where we have difficulty in terms of how this report conveys those issues. The focus has shifted to the women's directorate, left as sort of a gender-based response to the concerns that are there. The concern that we are hearing is that that response should be generally across the board, that the committee should have been more sensitive to some of those recommendations.

Mr Cochrane: I think in making that kind of an observation you are unfair to both the women's directorate and to the other committee members, because to say that the concerns were put before the group and that they were not acted on is not true. Because if you look at the recommendations of the committee, there are a number of very, very sophisticated ways that they tried to make sure that the concerns about domestic violence, mediator bias, systemic bias against women generally, were all met in some way though the model delivered. It is just not true that the committee had the concerns in front of it—

Mr Jackson: They are met through your model, but everybody says the practicum in Ontario is that it cannot be achieved. Do you at least agree with that point?

Mr Cochrane: That what cannot be achieved? That this model cannot be implemented?

Mr Jackson: Yes.

Mr Cochrane: I do not agree with that.

Mr Jackson: So you are quite convinced, in spite of the comments that Ontario is ready to implement this model?

Mr Cochrane: The recommendations in this model include something, just by way of example, of mediation associations getting themselves organized and more focused on the way they educate their members. The model that is recommended here says they need a particular kind of mediator, very highly skilled, very sensitive to—

Mr Jackson: We understand that. My question to you is on timing and implementation. Do you think Ontario is ready to implement the model you have brought forward as the chair of this committee? Is Ontario ready for this, and if so, how soon, and if not, how long?

Mr Cochrane: To take the first question, I think the committee was conscious in making its recommendations not to be unrealistic and that the recommendations are made with a very realistic belief this model is capable of being delivered.

Mr Jackson: Okay. I assume that or you would not have recommended it. I was asking

you if Ontario is ready for the model, and if so, when?

Mr Cochrane: I cannot answer the when part because there are so many things. Funding recommendations is an important part of doing this in a way that is fiscally responsible, which is another buzzword that is attached to it. The committee recommended that there be sharing of costs between the federal government and the provincial government. There was a recommendation that the Federal/Provincial Committee on Family Law Policy sit down and develop funding formulas to be able to share the cost, because many of the mediations arise from divorce actions which are really rooted in the federal Divorce Act. Those are the kinds of dollar questions that have to be answered.

So the when is difficult. The model itself is realistic and I think the committee came up with a set of recommendations that we felt could be acted on immediately.

The Chair: Mr Jackson, perhaps you could assist the Chair just a bit and indicate how much more time you think you may need.

Mr Jackson: About 10 more minutes. I can be brief with my questions. They are all enumerated here, Mr Chairman.

The Chair: We do have another witness waiting and we are almost 15 minutes over the time.

Mr Jackson: I apologize for being late.

The Chair: No, that is quite all right. I just wanted to get some indication. You feel perhaps another 10 minutes.

Mr Jackson: Yes. I appreciate it. I do want to apologize for being late. I was in fact filling in for the Minister of Education, speaking at noon hour today on alternative dispute resolution models for schools, so I was doing some work for the committee in absentia.

The Chair: I was just looking for some direction, Mr Jackson.

Miss Nicholas: Mr Chair, the only problem I have is that we do have the Ombudsman of Ontario here. She has been waiting for about 40 minutes. While Michael is a great advocate, we sat around for some 40 minutes to wait to go because Mr Jackson had requested his return and I am a bit concerned that we get too delayed. Perhaps my personal reason is that I have to leave at 4:30 today and I would like an opportunity to speak with the Ombudsman.

Mr Jackson: Let me indicate that from day one I indicated to the chairman that he was to

proceed on time and not await me. I did indicate that to you and would back the Chair in any of its decisions. I apologize, but I was filling in for the Minister of Education. I was caught on stage. I could not get off the podium.

Miss Nicholas: I had the Premier in my riding over lunch.

Mr Jackson: Let me get to my quick questions then and proceed very quickly.

The Chair: Okay. Thank you.

Mr Jackson: Michael, in the two times that you and I have talked in these forums, in the standing committee on social development with access legislation and now with this legislation in the justice committee, you have referenced the value of the California system. It is referred to as the no-fault system for divorce, the no-fault system for child custody.

Mr Cochrane: Just so you do not spend too much time on it, I do not think I have ever in either of the hearings spent any time praising the California system.

Mr Jackson: I think Hansard will bear out that in your initial presentation on behalf of the government you cited the work in California. I would invite you to revisit Hansard.

Mr Cochrane: I would be happy to look at it.

Mr Jackson: That would be great. What we heard yesterday before this committee was that the California system has undergone a review; I believe it is eight or 10 years after it has been implemented. Several things are coming through and have caused the government to rethink the no-fault approach to mediating family law. There was one that dealt with a statistic which shows that the incidence of repeat violence escalates under a mediation model and de-escalates under a courtroom model. Are you familiar with that research?

1530

Mr Cochrane: I have seen some work that the research staff for the committee have done on that point.

Mr Jackson: Another point raised on that was that the real costs somehow do expand under the mediation model, which was one of the points that the research uncovered in California, and that for pure economic arguments of justice—which are not good arguments; we all agree on that—for a pure economic defence of mediating family law in this fashion, there is some evidence of a longitudinal study that we are not getting the value for our dollar for that. Are you familiar with that part of the research in California?

Mr Cochrane: I am not familiar with that particular conclusion from California, but I know there have been similar conclusions reached in Canada.

Mr Jackson: The one thing that was learned from the no-fault system as proposed in California and other jurisdictions is that it moved away from being child-focused and child-centred. It is something I raised with you when you were before the committee first. As you know, you had the capacity to change your own legislation on custody access to become refocused on the child, and that was done. That was an amendment which we agreed on during that bill and I appreciated your wisdom in seeing that.

The California model has made a clear indictment that the system of mediation cannot work between the husband and the wife, and that somewhere the child fits within another type of relationship. The California recommendation flips the model and says that the most important thing is the child and that we will mediate for the child, in the best interests of the child. I know your report did not get into this in a lot of detail. Would you support that kind of an approach, given that we have seen a change in California, a response to how the no-fault system works. Again, because I have raised this question with you before, could you support our recommending that any model dealing with family law put the child first and foremost?

Mr Cochrane: I do not think anybody who does family law in Ontario would have a problem with that because that is the way our law is now. If anything—this is why I go back to your comment about me praising the California system—I believe that the Ontario method we have now is in many respects better and more advanced than the California model, because our Children's Law Reform Act has always been child-focused. The overriding consideration is always the best interests of the child. If anything in the discussions we had during standing committee dealing with the access enforcement legislation, we took some of the considerations they had in California—

Mr Jackson: We took the principle, but we did not take the legislation because the concern there was that we in Ontario make a clear statement that it is in the best interests of the child that they have joint custody, joint access. In California, after 10 years they have come to the conclusion that is not necessarily in the best interests, and in fact, with infants, their legislation goes further to suggest that it is not in the best interests of an infant to have joint access.

Mr Cochrane: Our Children's Law Reform Act does not say that.

Mr Jackson: The amendments that you and I worked on clearly state that the parent has an obligation to pursue joint custody in the best interests of the child. That is in that legislation.

Mr Cochrane: Absolutely not.

Mr Jackson: We can agree to disagree. That is how I read the legislation. That is what was before us. It is why I did not support it; there were many reasons why.

Mr Cochrane: I think the confusion may be that there was a private member's bill proposed by Mr Cousens that proposed precisely what you are describing, but it was not incorporated into the final version of that legislation. I know so.

Mr Jackson: It is a joint custody model. You and I both know that it is a joint custody model and that is what we are moving towards in this province. When you and I were before each other in committee, you did not challenge the notion that we were joint custody focused in our family law. Now you seem to challenge it. That is fine.

Mr Cochrane: No. You have mentioned Hansard. I think it is unfair that somebody might be misled by your remarks about that legislation, about my comments.

Mr Jackson: Somebody might be misled about your interpretation of the government's legislation. We can agree to disagree.

Mr Cochrane: Maybe we should do that, but maybe we should also ask that the Hansard be called up on the point.

Mr Jackson: That is why we have Hansard, Michael.

Mr Cochrane: I would like that to be made part of the record if it is possible.

The Chair: That issue has been basically challenged, what is on the Hansard, and the witness has asked for that Hansard to be called up. I am not sure that we can produce it this afternoon—

Mr Jackson: Of course you can.

The Chair: —but I would certainly hope that it would be available for us as early as possible next week because it is a fairly critical point.

Mr Jackson: I just did not want to proceed into a debate with Michael. I want to get on to my last question.

The Chair: It has been raised on a number of occasions by members of the committee, so it probably would be useful for the committee to

have that available, and I appreciate the request of the witness.

Mr Cochrane: I think the transcripts from those hearings are available, and I think they should be made a part of the record.

Mr Jackson: The final question has to do with the concept of denial of access to victims of violence versus the denial of rights to mediation for perpetrators of violent crimes. Do you have any difficulty if this committee changes the emphasis from a victim not having access to mediation to the criminal being denied access to mediation as a result of any elements of violence, emotional or physical to the relationship or to the children in the family?

Mr Cochrane: I am going to have to ask you to explain it. I am not sure what you mean by someone being a criminal being denied access to mediation. Do you mean that if someone was convicted of assault, he would not be able to use particular court remedies?

Mr Jackson: The mediation model as promoted in your report talks about exemptions for victims. That is where you are coming from. Is that not correct? What I am asking you is, do you have any difficulty if in our considerations, in our recommendations, we change the focus so that the right to mediation is denied a person who has expressed violence to a member of his family? I find it somewhat offensive that our laws are written from the perspective that the victim somehow has to be protected against something, whereas in fact our justice system should be designed so that someone who has perpetrated that violence is denied an opportunity to go to mediation, and therefore the emphasis is away from the victim in this instance and the focus is on the perpetrator. It is a fundamental shift in the way we write the legislation, but it achieves the very same thing. I am asking if you have any difficulty if we take that approach.

Mr Cochrane: I would, if only because—this is the first time I have heard this kind of a suggestion—it is unnecessary. The way this model is structured is that it leaves it in the hands of the parties themselves to consent or not consent to use a particular method of dispute resolution. There should not be any onus on a person who has suffered violence to prove that the other person has done something to prevent them from going into the system. They simply withhold their consent.

Mr Jackson: That is not the system we have in Ontario, though.

Mr Cochrane: That is the system that is recommended by this model.

Mr Jackson: It puts the emphasis on the victim to establish certain things. The existence of violence denies the right of a violator to use mediation. Every women's group that we had come before us indicated the concern that women find themselves put in a position where they become the unfriendly party, the unco-operative party because they say, "Look, I do not want mediation," when the whole system is geared towards going towards mediation.

This takes the emphasis and the focus off the woman as victim for being less co-operative and puts the emphasis on the perpetrator, who quite frankly wants to get out of court and into a mediation system because it is done behind closed doors, with a higher degree of confidentiality and not in the full light of day. But anyway, you know where I am coming from in that—

Mr Cochrane: Your point is a good one and what you really mean, I think, if I understand you, is that if someone withholds consent to mediation, is there a consequence? Is there some way they are disadvantaged in the system because they have withheld their consent to mediation? The answer is no in the existing system, because it is a voluntary model. There is no sanction for withholding your consent to mediation. This recommendation from the committee it is very specific that there should be no consequence for withholding consent to mediation. I think your concern about the onus being on one party or the other is a genuine one, but it is not necessary. The person simply withholds their consent. There are no consequences.

Mr Jackson: We would hope there are no consequences.

The Chair: Mr Jackson, I must say you have a good sense of political timing because you took exactly 10 minutes, which you indicated, and we appreciate that. I want to thank Mr Cochrane for coming back again and being available to the committee. I am sure the answers to the questions will be very useful to us when we do our final report.

Mr Cochrane: I will be happy to see it.

1540

OFFICE OF THE OBMUDSMAN

The Chair: Our next witness is Roberta Jamieson, who is Ontario's Ombudsman. She is a lawyer and has been senior mediator, commissioner and chief executive officer of the Indian Commission of Ontario, and she has been quite

active in the Canadian Bar Association alternative dispute resolution initiatives.

Thank you very much for being with us today. I understand you are going to be dealing generally with the issue of ADR in the administrative area and perhaps touch upon some issues dealing with first nations and governments. Thank you very much for being with us and please proceed.

Ms Jamieson: May I say to the committee as a whole that I am delighted to have been invited to appear today to talk with you. I have been invited to this session as someone who has a bias towards, I guess, and some experience in the field of what we have come to call ADR. As I was preparing to address you, I was struck by the fact that in a way all of us, each and every day, are engaged in some form of ADR.

It is not a new phenomenon. Each of you as MPPs practice ADR, I am sure, in weekly caucus sessions or in your dealings on issues between your constituents and a government department. We all do it in trying to settle issues between our children or between ourselves and our teenage son or daughter.

There are those who would have you believe that ADR is some radical concept to be approached with caution, that its use will require dramatic changes—a major infusion of resources or dramatic legislative reform. I am here to tell you that the ingredients necessary to resolve disputes by using alternative methods are really quite simple and are largely a matter of common sense. I have over time developed a simple checklist which I am happy to share with you today. It is something that I developed primarily with my experience at the Indian Commission of Ontario and I will be happy to table the report that I prepared, in its entirety, with the clerk today.

The two key elements, though, that you need to have are, first, you need to know what the issue is. I have found that can be extremely difficult to identify, but it is worth the time and effort required to isolate the real matters that are at issue. It is my view that so many issues that remain unresolved today because often the parties are not even talking about the same issue, even though they are using the same language. There may simply be a lack of communication.

Once you have the dispute identified, you need the will. That is the single most important ingredient, the will on all sides to bring about the resolution.

In addition there are a number of elements which are also important and they are covered in more detail in the paper. I will not take you

through all of them, but simply say that it is important to separate the aspects of an issue that can be resolved from those that cannot. Not all issues or all aspects of an issue can be resolved. Some involve deeply or dearly held principles on which accommodation is not possible.

You need to have people involved in finding the resolution who know that it is their job to do that, who are creative, who are dynamic, who have signals from above that their job is to find a resolution, not just to keep the discussion going or to make an effort, but to be involved and to pursue the matter with clear instructions with some latitude towards finding a solution.

There are many other ingredients, not the least of which involves some adequate resources, the ability to bring an intensive effort to bear on the task of finding a resolution itself. But again, I will leave those for you to review at your leisure in the document.

If you can bring these elements and more to bear, you will find, I think, that your ability to reach a mutually acceptable solution, which is after all the hallmark of ADR, is greatly enhanced. Rather than relying on the scarce and often unconstructive commodities of power and confrontation, you will find yourself liberated. You can explore in a creative way the construction of a solution which will not only deal with the issue at hand but will also lay the foundation for a positive and mutually beneficial relationship for the future.

It is my view that ADR does not represent so much a dramatically different or radical way of resolving disputes as it does an opportunity for all of us to recognize, validate and shape our existing talents; indeed, to rediscover techniques which have been practiced for centuries, from the Knights of the Round Table, who tried to find a way of having input into the decision-making of monarchs, to the Magna Carta and right up to the old town meetings where the citizenry had input into decisions of local government.

The very simple statement I am making is that ADR is not new. Aboriginal societies, about which I know something, had individuals who were recognized as wise and knowledgeable and who were used to provide an independent ear and advice to individuals who were having a conflict or a dispute. Each side was heard and a resolution was reached which would allow each individual to carry on with his or her normal life and to maintain a healthy and ongoing relationship with the other party involved in the dispute. The society could carry on normally with expectation that the dispute was resolved and any bad

feelings had been dealt with and the individuals would continue to contribute to the society as they had done before the dispute.

This method of resolving disputes and concerns between individuals or between individuals and the society or government is not unique to aboriginal societies. Priests and ministers have been used to resolve conflicts in the same way. Presidents and prime ministers have special envoys who are dispatched to provide independent counsel in conflict situations. Government has for years utilized fact-finders to act in a similar capacity.

But the essence of these approaches does have relevance today, for I believe we are at a point in our history when development of a harmonious, multicultural, multiracial society is not only a political goal, but is also essential to our economic and social future as a nation, and the changes necessary to achieve such a society are certain to cause stress, adjustments and accommodations to the established way of doing business as a government.

The continuing shift of people from the rural areas to the cities and the diversity of circumstances and lifestyles one finds across the huge expanse of Ontario make it very difficult for government to provide equity of service and equity in programs.

New economic pressures created by global forces, many of which are beyond our control, seem to be widening the gap between the haves and the have-nots. Resources are finite.

Environmental concerns are high on the public's list of political priorities and environmental issues are finding their way into questions of administrative fairness.

Ironically for me, as we begin to implement progressive policies which increase the democratic quality of our society, such as those regarding employment or pay equity, we seem to increase the need for instruments to ensure that these policies are applied evenly and fairly. Ontario already has over 500 boards, agencies and tribunals which act within and contribute to policy-making functions of government.

1550

Here is the crunch. At the very time when there seems to be an increased need for citizens to turn to their system of justice to help resolve disputes with and claims against government, we find that our efforts to ensure better justice have made our courts cumbersome, slow and a costly means of providing the relief we seek.

I believe the Ombudsman is the most creative and innovative ADR mechanism adapted by the

Legislature to our system of British parliamentary democracy. I commend the legislators who have provided the people of this province, in those relatively rare but personally significant moments when citizens and their government are in dispute, with a connective link to bring all of the resources of society to the aid of the individual.

In this context the Ombudsman serves best by providing a process whereby tensions between citizens and government can be viewed as disputes to be resolved to mutual satisfaction and thereby defused, rather than a gladiatorial contest in an adversarial process where only a conqueror and a vanquished can emerge, thereby further alienating citizens from their government.

The word "Ombudsman" indeed the concept itself, is a Scandinavian contribution to democratic government. It means literally people's agent or representative.

The Ontario Ombudsman, as you know, was established in 1975 with the passing of the Ombudsman Act and over the course of the last almost 15 years, the Ombudsman has become an important, modern instrument which the people of Ontario have put in place to ensure that they will be dealt with fairly in their interactions with governmental organizations.

One of the main purposes of the Ombudsman job is through its investigative process to resolve disputes. In my view, a test of the strength of any political system is the willingness and the ability of those who govern to open their administrative actions to the scrutiny of an independent and neutral body to ensure that there is fair dealing, equity and justice.

In my opinion, the concept of the Ombudsman as an official dispute resolver is one of the most elegant innovations to be engrafted on the political systems of modern democracies. As a means of giving the individual an opportunity for direct participation in democracy through the complaint process, an opportunity for direct participation in democracy beyond the election process, the Ombudsman idea is yet to be surpassed.

In commenting on the role of the Ombudsman, the Supreme Court of Canada put it quite succinctly, "The Ombudsman 'can bring the lamp of scrutiny to otherwise dark places, even over the resistances of those who would draw the blinds.'"

When we see Ombudsmanship in its philosophical context, we can see it is much more than a sophisticated complaint bureau. In fact, the Ombudsman represents not only a willing

listener but an energetic investigator and also represents an opportunity for the average citizen to shape the kind of government administration we all want to be able to rely on.

1550

My own challenge and obligation, being just over three months in the job, is to move the institution of Ombudsman forward as Ontario moves into the 21st century. In dealing with this challenge, I am often reminded that not only do we have positive forces trying to make the administration of government more just, fair and equitable, but we live in times when there are countervailing forces which provide us with deep concern.

Ontario citizens are, I believe, becoming increasingly aware that the courts are not always the most effective instrument to resolve their disputes with officialdom. The courts have prerogative writs to determine their own procedures. Often they only have the power to review a decision on a question of law and would be unable to review the merits of the case, its fairness and reasonableness.

The other traditional body with power to resolve disputes between citizens and administrators, the Legislature, has in fact created the Ombudsman and given her specific powers and only her the right and discretion to enter government offices to examine files, conduct hearings, subpoena witnesses, take evidence under oath and so on. I exercise these powers as a trustee for the people of Ontario. Although the Ombudsman is an officer of the Legislative Assembly, she is independent of politics and independent of the bureaucracy.

To the citizen seeking a resolution to his or her dispute with the government, the Ombudsman affords the advantage of an impartial agent, one who will cost nothing, with no requirement of counsel or the necessity of initiating legal proceedings. Citizens take their disputes to the Ombudsman because they look upon the Ombudsman as representing in a way the government's conscience.

How does the Ombudsman resolve disputes? First, she will go about her task by conducting an investigation, a fact-finding exercise which includes checking the history of the transaction complained about. She isolates decisions and decision-makers. She tries to find out the reasons for the decisions or if indeed there were reasons. In effect, the process of the Ombudsman is saying: "Wait, look at that action. Look at how and why it was done."

The Ombudsman process brings all the relevant points at issue into the open. During this process, the Ombudsman will ask many questions. Did the official have available all the facts and were these facts given balanced consideration? Were the rules applied properly or harshly? Did the official discriminate, delay or improperly pass the decision-making to someone else? Was there unreasonableness, arrogance or prejudice?

Then, by weighing the evidence connected with the alleged fault, the Ombudsman will reach an impartial decision as to the propriety of the action complained of.

If I make a finding that is unfavourable to the agency or government or organization, I do not then become prosecutor or judge. I do not have the authority to reverse, alter or annul a decision or to take disciplinary action. I use the power of reason and persuasion. I may recommend an appropriate change in the law or rule that caused the dispute which not only takes into account the interest of the particular complaint, but also the government as a whole. Failing a resolution, however, the final recourse is a report to the Legislature in which the dispute is brought to the attention of legislators with a recommendation that it be redressed.

In the final analysis, the ability of the Ombudsman to be of service rests on the goodwill of the government of the day and ultimately the Legislature to accept and act on her recommendations, and secondly, in the support which the public gives in ensuring that the Ombudsman remains a vital force in good government.

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The Ombudsman is the only institution able to take an independent look across the broad panorama of provincial ministries and organizations to see the nature of the full relationship between the public and their government.

I am exploring a number of creative and constructive approaches which I consider to hold promise in making the position of Ombudsman more responsive to the needs of Ontario's people in the 1990s, including the use and refinement of techniques associated with ADR. I believe that in the true spirit of win-win settlements, and I am sure you have heard a lot of that jargon, if there is a problem and it is resolved with the help of the Ombudsman, not only will the aggrieved individual be assisted, but we will have an improvement in the administration of government as a whole. From that, we will all benefit.

One goal I have for my tenure as Ombudsman is to reinforce the fact that the Ombudsman is a neutral independent instrument, rather than an impassioned advocate of a particular cause or—I certainly do not fit this—a knight in shining armour doing battle on behalf of the down-trodden. I do not automatically take the citizen's point of view or indeed the government's point of view. I listen to all sides.

To those who want me to be more of an advocate, I say that I have more clout if I have a reputation of objectivity and fairness. In fact, my ability to bring about resolutions depends absolutely on my credibility as an impartial investigator. That does not mean I am going to back off from injustices. On the contrary, I will pursue the matter vigorously until justice is done, but I will be more effective as a result of the reason and neutrality which I will bring to bear.

I hope to make persuasion and the art of compromise my most useful tools. It would be misleading to picture the Ombudsman after she has completed her investigation as brooding in splendid isolation and then stating her views to a rapt audience of government officials. From my experience, government officials are usually, if not invariably, reasonable. They are consulted during the whole process of resolving the dispute and arriving at the Ombudsman's recommendations.

Many of the Ombudsman's recommendations merely record conclusions reached jointly by the Ombudsman in concert with the administrators and the complainant involved. Sometimes indeed they might best be described as negotiated settlements representing what the officials and complainants have been ready to accept. Mutual enlightenment and persuasion may bring forth conclusions agreeable to the parties involved—the administrators, the complainants—but perhaps not entirely to the preference of any. But as far as the record may show, the Ombudsman simply made recommendations that were accepted.

The Ombudsman's role in all of this is clear. She is not a broker charged with the task of achieving a settlement at all costs. Her role is, once having investigated a complaint and deciding what corrective action is required, to ensure that the steps agreed upon, the settlement as it were, meets the primary test of justice and administrative fairness. She may use her skills as a mediator or conciliator to move the parties along, often individually, towards this goal, but her mission is clear: to ensure always that

government deals with its citizens in a fair, just and reasonable manner.

There are going to be times when that cannot be achieved. There are going to be those complaints which the Ombudsman decides are not supportable, and they will never reach this stage. There are going to be times when the proposal offered by the government administration to correct the wrong will meet the Ombudsman's test of fairness and justice but will not satisfy the requests of the complainant, and there will be times when no settlement at all is possible, in which case the issue may be placed before the Legislature to be addressed.

The disputes reaching an Ombudsman, I have learned, cover an enormous variety of subjects, running the gamut of human error from mere annoyances to complaints of wrongful infringement of liberty. I will give you a few examples.

A citizen may be concerned with the regulation of his or her neighbour's septic system, or may have suffered some damage as a result of government failure. In one case, a number of residents of a particular town suffered damage to their homes when a sewage plant operated by the Ministry of the Environment failed and sewage backed up. I will not go into graphic detail.

Mr Jackson: Not in front of the government.

Miss Nicholas: That is at least five years old.

Ms Jamieson: The ministry denied liability, but after our investigation a mutually satisfactory resolution of the matter resulted in payment to the home owners of 50 per cent compensation for damages. That is what I would call an ADR class action, a classic Ombudsman intervention.

In another case, a citizen was denied social assistance because she had no fixed address; she was homeless in effect. Our review resulted in a change in the policy of the board so that persons in need of assistance will not be denied on that basis.

In yet another example, Ontario Hydro did not receive payment from a mine and threatened to disconnect its hydro. Unfortunately, a number of residents—I believe 12 or 13 families—were also dependent on the mine's supply of hydro for the supply of hydro to their homes, and their individual accounts were up to date. Our intervention ensured the continued supply of power to these residents pending a change in the supply lines.

Those are only a few examples. We deal with other things, from wolf damage to herds, claims for coverage of different medical procedures by OHIP, difficulties encountered by those receiving support through the support and custody

enforcement program, claims for compensation by investors and concerns about the regulation of gravel pits. The list is almost endless.

But in many of these disputes ADR techniques are appropriate and their use, in my view, will assist in meeting the challenges confronting any Ombudsman, namely, citizen satisfaction, improvement to the overall administration of government and helping to humanize the huge bureaucracies without impinging on their effectiveness.

ADR affords us with an opportunity to apply these familiar techniques to the problems and issues which affect us all—how to draft amendments to regulations under a particular act to not only accomplish stated program objectives but also to respond to the particular needs of the disabled or the homeless—and global issues such as how to craft a blueprint for the future which will allow us to prosper as a nation and at the same time sustain our environment.

In conclusion, the concept of alternative dispute resolution has in fact taken flight in North America over the past decade or so. In the United States, hardly a week or a month goes by when there is not a conference, a seminar or a bunch of courses published on the subject. The Canadian Bar Association has recently published a paper urging substantive consideration of its use throughout our justice system. There has been a rush of publications on the subject.

I have posed the question today whether this is really a new subject or whether the interest in ADR is a plea to go back to some of the same old tried and true methods of resolving disputes. Whatever the answer to this question is, I as Ombudsman am very excited about the prospects for the future.

Thank you very much. I would be happy to entertain any questions and would like to introduce, on my left, the director of investigations and legal services with the Office of the Ombudsman, Gail Morrison.

1610

The Chair: Thank you very much. We do have a number of members who want to ask questions. First is Miss Nicholas and then Mr Epp.

Miss Nicholas: I have a number of questions, and I will just try to condense them here.

First, I wanted to put in practical terms perhaps the role of the Ombudsman. I wish I had your report in front of me, but in terms of numbers I think you have said the variety of cases—I know I left for about four minutes, but you never, I do not think, got into numbers. I know that about

15,000 people contact you per year and then you put down how many are in your jurisdiction, and I think it would be good, for the record, just to know how many of those that are within your jurisdiction end up being settled.

I think in the end only six or seven cases per year end up being recommendation-denied cases, meaning that the Ombudsman in his or her role has been unable to resolve the differences between the government and the individual. I just cannot remember the numbers at this time, but I know it is an enormous amount of cases that you deal with.

Ms Jamieson: I was shocked to find out that 25,000 inquiries came to the Office of the Ombudsman last year. Those are inquiries. They are not all within our jurisdiction, as you said. As for the details on how many were and how many got dealt with, I am going to ask Ms Morrison to speak to those. I was frankly surprised at the number that come.

I also will say that I know now that our statistical reporting does not always reflect the ones that were dealt with. Some of them are quickly resolved with a phone call on first contact. I frankly would like to find a terrific way to show that record, but I am going to ask Ms Morrison to speak more to the specifics.

Ms Morrison: I do not have the numbers right in front of me, but as Ms Jamieson has said, roughly 25,000 people contacted us last year. Of those, about 6,000 were jurisdictional complaints. When I say they are jurisdictional complaints, it does not mean all the others, that is the 19,000, were not things within our jurisdiction, but they were either resolved very quickly or they were premature. We had to send someone to some other mechanism before we could look into the matter. A number of them would be abandoned for various reasons, particularly the correctional complaints.

Of those 6,000 which we do complete investigations on, you are quite correct in saying that only a handful, perhaps half a dozen, end up coming before the legislative committee as recommendation-denied complaints. Most of the rest are resolved one way or the other. Of course, that often means resolved by our not supporting the complaint, but it does mean, even in those cases, that we have often supplied the complainant with information that satisfies him that the government did its job.

Miss Nicholas: Or justice. They have had the opportunity to have one more person—

Ms Morrison: Review the matter.

Miss Nicholas: —review the matter and assure them that they have been dealt with appropriately. So that means that 5,994 or so cases you are successful in almost fully mediating per se, or looking at or investigating. It is an enormous number, and that is something that always impressed me.

The other thing is, Ms Jamieson, you were saying that you are not really an advocate, yet you really only can deal with—you have two roles I think: one is to deal with systemic problems within the government, and I think about those you have pointed out some real policy changes that can be helpful. But a majority of these complaints are people who write to you and make a written complaint and you take up or investigate their case.

They have to make the first contact, they have to make it in writing for you to thoroughly investigate it. In that way I think many a time you are their advocate, because you are investigating it, not advocating on behalf of them but bringing forward—you would not have investigated it had they not come to you, more than likely.

Ms Jamieson: I think perhaps it is a fine distinction. Many people want to regard the Ombudsman as advocate. Others think we are part of the government. I always think that I must be doing a good job if I am getting equally accused on all sides.

Mr Jackson: Or nobody knows exactly what you do. You must be doing a good job.

Ms Jamieson: Yes. Perhaps I spoke to this while you were out for four or five minutes, but I think it is very important for the Ombudsman to be seen as independent and neutral. My job as far as I can see is to act on a complaint, to see what took place, to find the truth and to apply a test of fairness. I get involved when someone comes to me, it is true, but we do not automatically take his point of view, even though we are exploring the issue he has brought to us to find out the true picture.

I think that unless we can see and accept the Ombudsman as being neutral and independent, albeit acting on complaints, it is going to be a very tough job for us to convince and persuade government agencies and organizations that we are acting not only in the complainant's interests but in their interests in finding a solution to the issue that has come before me.

So I think it is important to me that the Ombudsman not be seen as either—I think someone once said—solely advocate of a citizen or solely apologist for the government. Somehow I have got to find a way to walk the fine line

between the two in the name of fairness and justice and truth and try to find solutions that are not only in the interests of the complainant but in the interests of government as a whole.

Miss Nicholas: I know numbers are hard, but how many people would you say come to you as an alternative to the court system? They might have been provided with an appeal mechanism or some kind of mechanism through a traditional court system and maybe their time has run out, but they come to the Ombudsman as a less expensive alternative.

Ms Jamieson: I think that that is true. I will ask Ms Morrison if she wants to comment on this further, but my impression thus far in the job is that people do come to the Ombudsman because it is a very expensive operation to go to the courts; it is time-consuming. I am sure you have heard some very eloquent analyses of the court system in this committee, but there are inherent difficulties and the average person has difficulty affording it, even though legal aid is available. Many people do not meet that test either and are somewhere caught in the middle. I do think people come to the Ombudsman as an alternative. Hopefully, the Ombudsman, in the ideal situation, offers things that courts do not: quick-moving, uncomplicated, not bureaucratic, for free, those kinds of things. But I will ask Ms Morrison to comment further.

Ms Morrison: I should just clarify that we are very careful when people come to us with matters which could go to the court to ensure that they realize the difference between our kind of work and what the courts do. As you are aware, the Ombudsman can only make recommendations and we would be remiss if we misled people into thinking they are going to get the same remedy from us that they would get from a court. Mostly they will not. But we do get a large number of people who choose to deal, obviously, with government problems by coming to us, because taking government to court is a very serious and expensive matter.

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Miss Nicholas: Why do you think one of the main themes that has come up is that we should not force people to mediate but should provide that as an alternative for two parties who are willing to submit to a mediation process or to an alternative?

I know that in some instances that you deal with, quite often government agents could be very reluctant to adhere to your recommendation. The recommendation-denied cases are a

tribute to that. Many, after they have come to the legislative process or the committee, if the Ombudsman's recommendation is supported, then implement the recommendation, but others do not.

What they would prefer right from the beginning is to go to court. That is what they want. They do not want to engage in a mediation role or be participants in mediation. They want to go to court and that is what they say to you in the beginning, that is what they say to you when they come before the legislative committee and that is what they continue to say after they have left and the committee has made its recommendation, whether it supports the Ombudsman or not.

I would like your comments on that because many people have said that both parties have to be willing to mediate and that is what makes it successful, but every government agency would rather not get involved very often. Sometimes they are very happy, but most of the time they are rather dismayed when the Ombudsman comes and starts investigating. I would just like your comments on that.

Ms Jamieson: You have opened up a number of my favourite issues. One is the last thing that you alluded to, sort of the "Oh, no, here comes the Ombudsman." The Ombudsman syndrome, I call it, and frankly I am very keen that we look at that directly and change that.

I think the Ombudsman is a tremendous resource to people and many of the ministries do regard us as that. We have the largest body of knowledge and experience in the country in administrative fairness. I have been just amazed with the level of professionalism, the experience and the expertise that I found at the Office of the Ombudsman, and delighted.

I am talking to people now, frankly, on ways that we can make that constructively available, maybe ways we can make it available up front to prevent problems from occurring. But we have to start dealing with attitudes and get people not to see the Ombudsman as a sort of, "Oh, no, here comes the tax man." I would prefer them to be able to say: "Terrific, maybe they have some ideas on how we can deal with this issue. Great, maybe they have dealt with this before and have something to offer us." That is one of the things that I am particularly keen on changing.

Miss Nicholas: What about when they say to you, "We do not accept your recommendation. We want to go to court," and you choose otherwise to come to the standing committee or through the legislative process which has been

afforded you and which can be a very effective alternative?

Ms Jamieson: I have not been through this yet as Ombudsman, but I will tell you, drawing on my previous lives, if there is no willingness, it is very difficult to find a solution. Sometimes—again I am speaking from personal experience in my previous lives—if you do not have the willingness, evidenced by adequate resources to find a solution, flexible instructions from the top, a signal that resolution is the name of the game and not to keep talking and not be rigid and not perpetuate and not stick to the letter, if you do not have those things, it is very difficult to find an accommodation of any description.

You can only persuade people and convince them if they are going to open their minds to be convinced and persuaded, if there is a willingness to put their energies and their time and their support behind truly addressing the problem, the issue. If you do not have that and you cannot find it by escalating up the ladder, I am not sure where that leaves the Ombudsman except with the available channels, the tabling of the report, the raising of the issue, bringing it to the Legislature which is very well equipped to deal with these disputes in the final analysis.

Do you have something to add to that, Gail?

Ms Morrison: Just one point, that the Ombudsman has some discretion not to investigate complaints but the discretion, in my view and in most of the Ombudsman's views to date, has been one that should be exercised very carefully because the Ombudsman could be open to serious criticism for choosing her complainants, backing only those who are in one social category, or you name it.

There is nothing in the act which suggests the Ombudsman should refuse to investigate complaints because they could go to court. I think it is a very dangerous thing to have a kind of rule that says, "Well, if you can go to court, you should go." Almost all of the things which come to our office could in one way or another, either through judicial review or through any other number of court procedures, be dealt with by courts.

If the Ombudsman is to be an effective mechanism at all, then I think that is not a sensible limitation on her powers or her work.

Mr Epp: I get the impression that you are enjoying the challenge.

Ms Jamieson: I am.

Mr Epp: Given your past experience and your present experience, are there any areas that you find where the ADR should be improved in your

context or in other contexts? You gave us a very good synopsis of the things that you do, but are there areas where it should be improved?

Ms Jamieson: Yes, I think so. Again, I will draw on my own personal experience over the last 10 years or so. I think there needs to be a good deal more time, effort and resources spent on providing some training to people in the field because, while I say we use these talents and techniques which we all have every day, there is a way to refine them. There are ethics in chairing negotiations or acting as a conciliator in trying to bring about a resolution of an issue. There are things that you can learn: the importance of keeping a record, the importance of independence and neutrality. Those things, I think, can be schooled, honed, taught and I think that there should be some more time spent on that.

I myself, when I was commissioner of the Indian Commission of Ontario, brought some people up—at that time Harvard had a terrific program—and they held a session for about 70 people representing the government of Ontario, the government of Canada and the first nations in Ontario, to come to a session and talk about what negotiation is, what creative problem-solving by consensus is, what does it mean, what is involved. We got a terrific response to that. I do not think we do enough of that and encourage enough of that.

I understand now we have more of an expertise here within the province. We did not in those days and it is growing now. I think there should be some time spent on what the professional qualifications are that are required to act in this field. It is something that certainly the United States has been focusing on. There was a huge conference on ADR by the American Bar Association last year, and one of its prime topics was, "How do you regulate this profession?"

As in any burgeoning field, lots of people are going to jump on the bandwagon, and if we are going to get behind this service, this technique, in the province, then I think we have an obligation to ensure that what is being offered is up to an acceptable standard. I would say that is the single area where I think there needs to be some time and some money spent.

Mr Epp: Do you want to elaborate a little? You have obviously given thought to this. You have studied it. Do you want to elaborate on who might do that best? Should it be a course at a university or a community college, something of that nature? It is not something I am terribly familiar with or that I even know that courses are being offered in on a regular basis, aside from

seminars being held. Are there other jurisdictions that have done something extensive in this area? California, I guess, has done something.

Ms Jamieson: I am not focused on who should do this in particular. Harvard is doing a great deal of it in the United States. I have been down and had a look at their negotiation program and I was quite impressed with it. They are associated with the faculty of law. It is kind of a natural thing. I do not think you have to be a lawyer, by the way, to act in these capacities.

Mr Epp: No, I would not think so either. In fact, it might be an advantage not to be in some cases.

Ms Jamieson: Maybe. Some of us are pretty adversarial, you know; we do not know how to act otherwise.

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Mr Epp: I say that in the presence of a lawyer beside me.

Ms Jamieson: And I am a lawyer, so I can get away with these things.

Miss Nicholas: Both of them are too.

Ms Jamieson: But I would say that I do not know who exactly. Maybe a co-operative venture should be launched. I know we have some expertise at York University and at Ryerson Polytechnical Institute, and maybe it would be wise to get some of these people together and see what they can recommend by way of course offering. Whether there should be a special department or a faculty, I have not put my mind to that.

Mr Epp: I am sure some of the presidents of universities who are listening will want to get their staff checking right now to see what government funding is available so that they can get some more government funding for their universities.

Ms Jamieson: Perhaps.

Mr Epp: Thank you very much. I appreciate your being before the committee.

The Chair: I have a number of questions. I do not see any other questions from the committee members. Last week Gordon Henderson, past chairman of the Canadian Bar Association, was a witness. He suggested a legislative framework dealing with the issue of alternative dispute resolution.

Upon questioning, he suggested that it might be appropriate in Ontario to establish a self-governing body similar to the Law Society of Upper Canada or the College of Physicians and Surgeons of Ontario to be self-governing in this

particular area, to set standards, ethics and perhaps some guidelines in terms of qualifications. Do you think that would be a useful provision for the government of Ontario or for the people of Ontario?

Ms Jamieson: I certainly agree that the people who would know how to do it best and what is required are the people who are in the field. I would wonder about methods of regulation that were going to be put in place and, of course, as Ombudsman, in the back of my mind I am wondering whether it is going to be something within my jurisdiction or not, whether fairness is going to be available and how procedures and how regulation would be done. That would certainly be a primary concern. But I am a firm believer that people in the field know what is required, provided there are some adequate checks and balances to ensure fairness.

The Chair: One of the things that we are grappling with as a committee is just around that particular point. We have obviously seen, as laypersons, as legislators, a certain phenomenon happening out there over the last five, 10, maybe 15 years. We see the creation of the Ombudsman's office, private courts, mediation in family law, conflict resolution centres. There is obviously something societal happening out there, and really, as a committee, what we are trying to do is come to grips with that and try to define whether there is a broad-based policy role for the government to play in this whole area.

There have been a number of expert witnesses who have been here in the course of the last two weeks, and I have asked a number of them basically whether they feel that Ontario has any kind of a discernible or broad-based policy dealing with ADR, and the answer has been no. First of all, I want to ask you if you think there is a discernible broad-based policy dealing with that particular issue. If so, what do you think it is? If not, what do you think it should be?

Ms Jamieson: Because I have been able to be the head of now two ADR mechanisms in Ontario—the Indian Commission of Ontario is unique in the country; the Ombudsman, of course, is not, but it is also an ADR instrument—I have assumed that the Ontario policy on ADR is a very supportive one. Is it written down somewhere? Is it clear?

I would not know where to pick it up, but at least in the creation and perpetuation of these institutions and the success that the Ombudsman has been having in terms of getting recommendations accepted, I see an implied support for the concept. I think it would be terrific if something

clear and more supportive were to emanate from the government. I am not sure that dramatic or extensive legislative reform is in order. I think the beauty of ADR is that it is uncomplicated; it is not fraught with restriction and so on. So I would look very carefully at the kind of legislative reform that was contemplated.

I do think there is a need, however, for a framework. I have seen these institutes and centres spring up as well as you have. There is, I found in my last post, very little communication between them, very little understanding of what people are doing over here as opposed to what is happening in Victoria with its commercial institute or as opposed to what is happening in Ottawa with the Canadian Institute for Conflict Resolution there. There is no framework. If something could be done to bring support, form and shape to the field and professional qualifications and regulations, those are the things that I would urge the committee to focus its time and energy on.

The Chair: I would like to go back to one of your initial statements where you had indicated that the most important factor is the will in this whole area of ADR and without the will it is not going to happen. We have heard a number of witnesses come before us and talk about court-annexed ADR. In some jurisdictions there is actually strong incentive given to push people into the ADR mode, and in some cases sanctions if they choose not to take that particular route.

Here in Ontario, we have the Macaulay report, *Directions: Review of Ontario's Regulatory Agencies*. Several of the recommendations deal with ADR. As you have indicated, there are over 500 agencies, boards and commissions in Ontario—the ABCs, as they are called. One of Macaulay's recommendations indicates that they all should promote the concept of ADR.

In fact, if I can read from one of the recommendations on mediation and conciliation, "An agency may on its own initiative, or at the request of the parties to proceedings,"—but particularly an agency on its own initiative—"convene a meeting of the parties, or their representatives, to mediate or conciliate the issues in the proceedings."

Do you think there is a risk involved in moving towards court-annexed ADR to try to push people into it, if I can use that term, and in the case of ABCs or tribunals, to push people into that particular area? Is there a fine balance there that we have to find, as legislators, or as a government making policy in this area?

First, if I can summarize my question, do you agree with the concept of court-annexed ADR and administrative tribunal-annexed ADR? To what extent, and how perhaps can that become part of government policy?

Ms Jamieson: That is a huge question. It depends what you mean by "annexed." I think it is clear that ADR is only going to work if there is a will. I think there is some merit in requiring people to attempt it, but you cannot get a settlement out of people who do not voluntarily submit to the process and bring the good faith to the table and the willingness to get a solution. It cannot be done.

I would like to see greater emphasis in all forums on allowing people the opportunity to take responsibility for the settling of a dispute. If they take responsibility for it and participate in it, they will be better able to carry it out and live with it, and if they can find a solution that is a win-win one, then they will feel that they have not lost in the bargain and I think we will have happier parties as a result. But there is a major attitudinal shift that we need to bring about, and I think by some education.

As I said, when I was commissioner of the Indian Commission of Ontario, I held a session on win-win solutions. People have the idea that if you go to settle a dispute and you submit to the involvement of a third party, somebody is going to lose. It is a win-lose game, it is not a win-win game and I think we need to disabuse people of that concept. We need for them to look at conflict resolution as a way for them to find a solution that will be in their interest and the person across the table's interest.

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I think if you can do that, you will have people more willing to volunteer and submit to processes that are less complicated. Once you develop the track record and demonstrate that it is useful, I think more people will be willing to take advantage of it. So I am coming around to saying that I think I would like to see it promoted. I think I would like to see it phased in. I am not sure I would like to see it required unless you phase in the requirement along with a public education process, so that people understand the true nature of what they are being asked to submit to or be involved in. I would like to see them see it as an opportunity, not as a task or an exercise they were submitting to. It is that whole attitudinal shift that we need to bring about.

The Chair: In terms of that attitudinal shift, we have seen, for example, in the area of pay equity where governments have tended to initial-

ly do it themselves and do it internally as a model and as an example, then move into other areas as people became familiar with the concept and the process and the need. Now there has been some discussion, in the course of last week and this week at this committee, that perhaps government policy could move towards the area of example in ADR.

In particular, government contracts with third parties, the tremendous number of third-party contractual arrangements that the provincial government has in terms of purchasing, services, consulting, etc., perhaps require some standard arbitration and/or mediation and/or conciliation-type clauses which would be voluntary but would be promoted as desirable. There has been talk that the government of Ontario could promote the concept of ADR internally between or among its own ministries where there is a lot of conflict from time to time.

There is talk about promoting the ADR process through transfer agencies through to the school boards and the municipalities in some fashion to show leadership in this issue, that conflicts can be resolved in a nonadversarial manner. Do you think that that is an appropriate area for this committee to look at as a possible recommendation for government policy?

Ms Jamieson: I think it is essential that the committee look at that area and I would strongly recommend that you do so. I think leadership is required, and I think not only leadership in promoting the concept but also leadership in a willingness to put one's mind to creating a track record.

I am a firm believer that you change people's minds by demonstrating, that you do by doing, and I would like to see a great deal more of that. I think that we do not use enough of these techniques, that if we were to build into agreements that we reach—I have had this discussion over many hours in my previous life with governments and first nations—if the treaties had had some of these dynamite ideas in them, maybe we would not be all having the disputes that we are having today.

But I think there is a lot of room for those creative ideas. In the past, parties have felt somewhat threatened or compromised. They felt they were going to give something up by showing a willingness to give, to involve a third party. They felt they were giving up some control to somebody else, but I do not think it is a weak-kneed, cowardly thing to acknowledge that there are going to be circumstances where we are

not all going to agree and we might be able to use the services of another person to help us.

I also think, frankly, that the Ombudsman has a role to play in this field and that with the expertise we have in the field of administrative fairness and in using ADR techniques, perhaps invisibly every day, we can share that expertise and knowledge with senior managers in the government agencies, boards and tribunals. That is something I am very interested in exploring, because I think we all have a part to play in this.

The Chair: I do not see any other questions from the members of the committee, so Ms

Jamieson, Ontario's Ombudsman, and Ms Morrison, the director of investigations and legal services for the Ombudsman's office, I want to thank you very much for coming to the committee, making your presentation, sharing your ideas and the benefit of your extensive experience. Hopefully, some positive recommendations will come out of the committee and they will be seriously considered by the Ontario government, so thank you very much.

The committee is adjourned until 10 am Monday 26 February. Thank you very much.

The committee adjourned, at 1646.

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Standing Committee on Administration of Justice
Alternative Dispute Resolution

Second Session, 34th Parliament
Monday 26 February 1990



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Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Monday 26 February 1990

The committee met at 1017 in room 151.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: Good morning. The standing committee on administration of justice is in its ninth day of the study of alternative dispute resolution in Ontario, and today we are very happy to have as a witness Joel Shawn, who is co-chair of the American Bar Association, family law section, mediation and arbitration committee. Please proceed.

Mr Shawn: I would like to start out with indicating that I have a bias. As far as I am concerned, mediation is my baby and I want to see that baby grow up and be a strong individual, have a good reputation and be intelligent and well respected. That is not to say that I believe that mediation is available or appropriate for everybody who has any conflict, but most of my remarks, to the extent that I comment on what I think are deficiencies in systems available now, are based, at least in my view, on the fact that I believe the system will result in work and a product that could injure that reputation that I would like to see mediation have in the future.

What I would like to start out with is an overview. I have promised myself I will try to keep my remarks to a half hour so that if you have questions we can address those and not leave you with burning issues left open. I am going to divide it into what I see going on in the private sector as well what is going on in the public sector.

Starting first with the private sector, particularly in California, there has been a growing trend towards private judging. What that results from is an enormous backlog in the trial calendar. It is not uncommon for an average case to be called to trial three times before it is in fact assigned to a judge. Both the litigants and the lawyers look at that as an inordinate abuse, particularly when one looks at the financial costs associated with preparing for trial two or three times. In addition, someone whom I will be referring to, probably, throughout these remarks, Justice Donald B. King of the Court of Appeals in California, believes that the quality of the judiciary is diminishing by virtue of the fact that there is a tremendous attraction to leaving the

bench and becoming a part of some private judging group.

We have two forces at play for the litigants. The system does not afford them speedy and efficient trial opportunities, those people who need to litigate, and at the same time the quality of the judiciary is going down and therefore they are becoming less trusting of the judiciary. The result is that we are now finding we have two classes of justice. We have private judging at \$250 an hour, plus the costs of some location to have a trial at, plus the costs of a clerk and a court reporter. If you can afford that and are interested in getting your case heard quickly, then you can opt for that. If you cannot afford that, then you will continue on with the two or three times before you get to a judge and, if we believe what Justice King is saying, you will then get a judge who is not very qualified for or interested in your case.

The other available opportunities in the private sector include arbitration, of course, but I think it is a fair comment to say that arbitration, particularly in family law matters, is rarely used in the private context, that is, that the parties and the lawyers will agree to submit the matter to arbitration. What has customarily been happening, again, as a response to the delays in the court system, is the idea of the equivalent of a mini-trial.

What that involves is that the lawyers and litigants decide there is some experienced lawyer in the community whom they trust and are willing to submit a particular linchpin issue to, and allow that person to either decide the issue or make recommendations as to how the issue might be resolved short of trial. That process obviously is a voluntary one and has none of the restrictions; if the result is unsatisfactory, you have a right of appeal.

There are also voluntary mediation projects and programs. I and a therapist have one in San Francisco called the California Mediation Service. There are also mental health professionals in the community who make themselves available to people, particularly in the child custody and visitation areas. That is a brief overview of what is available outside the court system.

Within the court system there is one way the courts in some counties have been attempting to

meet the fact that they have an insufficient number of judges to handle the cases on a regular basis, and unfortunately most judges, unless they have some experience in family law, do not like family law cases. They are very emotional cases and at times they feel that the work is too hard and draining for them, and they have to learn an area of law they are not generally familiar with, normally being involved in either commercial litigation or personal injury work as judges.

What we found is that California has a certification program for family law specialists within the bar. Litigants and their lawyers, with the authority of the court, can select a lawyer to act as a judge pro tem. He or she is sworn with all of the powers of a Superior Court judge, which is our highest level of trial court. The person is paid his normal hourly rate or whatever the parties agree upon for their services. However, at least you avoid the cost of a separate location, a court reporter and a clerk because the court makes a courtroom available for the trial and you have all the normal services provided by the judicial system, including the right to appeal.

The downside of that process is that although you get someone knowledgeable on the law, you have probably someone who does not have a lot of experience in the judging process. And because they leave the bench when your trial is completed and return to their offices where they have active law practices, they tend to delay the decision-making process. In my experience, it can take as long as six to nine months before they get out the decision they said they would give you in a week or two after they left the bench.

In San Francisco and surrounding communities, for litigated divorce cases, there are some forms of settlement programs that are mandatory. The lawyers and the litigants must participate in this process prior to trial. In some instances it is as much a month before trial. In others it is only a week before trial. My personal view is that there should be much more time between the date of the settlement conference and the date of trial, the reason being that lawyers cannot necessarily prepare a case for trial in a week. And so, if you are going to have a meaningful settlement process that saves money for participants, it ought to occur at least sufficiently in advance of trial so that if a trial does in fact have to go forward and a settlement does not occur, at least you do not find that the lawyers and the parties are working on two tracks at the same time.

In San Francisco the settlement program works by volunteer lawyers. Two lawyers will be assigned to a case. They will spend about three

hours in an afternoon with the two lawyers and the clients on the other side, attempting to resolve the case. There are numerous documents that must be filed in advance of this meeting so that the lawyers are given an adequate overview of the case. There are disclosures made about expert witnesses, experts' reports are included and any other data that a settlement judge would need in order to assist the parties in arriving at a settlement, hopefully.

In Alameda county, which is a county across the bay from San Francisco, they operate on a single-assignment system. That is, once your case is filed—there are two family law judges—you get assigned, odd or even, to one of those judges. That judge has your case from beginning to end and will try the case as well as hear a settlement conference. Many lawyers think that it is inappropriate for the same judge to hear a settlement conference who is going to be trying the case, but the matter has never been challenged to a superior or an appellate court. The disadvantage of that system, at least as it works in Alameda county, is that this judge is still dealing with all the other cases that are on his calendar and your trial is generally bifurcated over several afternoons over several months, whereas in San Francisco there is now a trial department that is available to try cases that do not settle at the settlement conference with lawyers, and a judge is assigned to hear those cases on a weekly basis.

By statute, in California there is mandatory arbitration of any low-asset cases believed to be under \$50,000 in property. Because of the cost of real estate in California, that does not include any home owners, because most houses have an equity over \$50,000. It is not binding arbitration in the sense that you have no right of appeal and the arbitration decision is final; it is binding in the sense that you must go. Most people who believe that a case cannot be settled will opt out of the arbitration process, if they can, by court order because, again, we are faced with the cost of two trials. They are going to put on a presentation before an arbitrator. It is not binding. They will then be faced, once again, if it does not settle as a result of the recommendation of the arbitrator, with the problem of having to prepare that case and try it again before a Superior Court judge.

What California has the most experience in is mediation of child custody and visitation disputes. It all started with the gentleman I earlier referred to, Justice Donald B. King. In 1977 he was the Superior Court judge who was in charge of the family law department in San Francisco, and began a process by local rule that began to

afford litigants the opportunity to move from the courtroom setting to a mediation setting within the courthouse by court conciliators, to attempt to mediate the child custody and visitation issues. Justice King said that between the period of 1977 and 1981, the number of contested custody cases in San Francisco dropped from 400 per year to three or four.

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I would like to read you, just briefly, an excerpt of a statement he made on 6 December 1978 before the California State Senate Judiciary Committee. He said: "Child custody is a legal problem only because the legislature by statute requires a judge to decide it. In reality it is not a legal problem. It is a human problem, an interpersonal problem, a psychological problem and a child development problem. The only real legal issue ever involved in such cases is whether or not the court has jurisdiction over the parties and the child."

To this day he has maintained that view and has been an ardent advocate for some means of finding a way to get the interpersonal and psychological problems out of the courtroom and into some process that can result in a fair resolution for the parties. Last year he took some time to come down from the Court of Appeals to the Superior Court bench and took 40 pilot cases under a settlement program that he administered, which he believed was the new way to deal with family law cases, and from conversations I have with him I think he is on the right track. The idea is early intervention, that once the parties get invested in their positions and the direction in which they and/or their lawyers are beginning to push a case, it is hard to get them off that track.

If someone with a sense of authority and at the same time a sense of caring gets involved in an attempt, even if it is embarrassing for the lawyers, to tell them, "There is no way you are going to win on this issue; this is not something that is legally cognizable; is there some other way we can deal with solving the problem?" I think it has a tremendous benefit in bringing about early settlements and the waste of judicial time on skirmishes that are necessary for psychological reasons for the participants. He has hopes of trying to see whether he can get that program instituted on a larger scale as a pilot project in some other superior courts.

I had one case that participated in that program in San Francisco and found that, from a personal observation, even though we had a problem with a young child and a father who was an alcoholic, he was very helpful and understanding in

bringing about a reasonable and expeditious resolution of a case that could have taken years and expended enormous amounts of moneys in the judicial system.

So in 1981, California in the custody area became the first state, I believe, to begin with a formal mandatory mediation program. The problems of dealing with a system like that sometimes can be more than they should be. The problem in San Francisco is that there are 26 trial judges and there is only one family law judge. The presiding judge of the court is generally, and has been historically, reluctant to allocate additional resources to the Family Court when faced with large numbers of asbestosis cases, probably at the 50,000 level, as a result of people who worked in the shipyards during the Second World War in San Francisco, many of them over the ages of 60 and 70, and sees that the needs of the Family Court are not as great. As a result, the mediators work under difficult conditions, they have small offices, they added one additional person to their staff last year who has no office and so they went to a flex-time arrangement so that they would shift hours and someone could have an office.

There is no fee charged to litigants for the use of the process, and that is a cut that has to be made, I think, at each jurisdictional level. Alameda county and Sacramento, California charge a fee for the mediation services. San Francisco opted out of that by charging a flat fee for any custody and visitation matter that is filed in the court system because they believed that it was too difficult, after it was concluded, to assess liability for the fee between the two litigants and then, most of all, collect it after they made the assessment.

The process is in flux in one sense, and that is that in San Francisco, up until about a month ago, you could not get two people who were in conflict over their children to a mediator until you had filed something in court that requested a judicial determination about the children. The result was that you would arrive at the courthouse at 9:00 o'clock one morning and you had some time before 9:30 because between 9:00 and 9:30 the judge will call the calendar, the litigants will see a video on why it is best for them to decide what is in the best interests of their children and what children normally experience in going through the divorcing process, and then you will go to a mediator.

If the mediator does not get a result by 11:30, you had better be back in the courtroom to get a judge to decide it for you. So they are working

under a one-and-a-half to two-hour constraint to get an agreement. The result of that is they are very focused on getting agreements. The further result of that is some of the agreements are not very good, which causes the people to come back to court again.

It also causes, I think, in some people, the feeling that they have been muscled into an agreement, and in fact the term "muscle mediation" at times prevails among the bar in describing how the mediation works. As I told you earlier, mediation is my baby. I do not like it to be referred to as "muscle mediation." In fact, it is, in part, a misnomer to call it mediation under the court system, because mediation, from my perspective, is a voluntary process. It is a voluntary process in which you have the opportunity to select your mediator. You do not get either of those choices in the court system.

In California, the court system is such that you must go to mediation before you get to see a judge, so it is your ticket to the courthouse. You must participate in mediation. Whether or not you believe that the conflict is one that is irreconcilable, you must participate in mediation.

San Francisco is now beginning to follow what has been available in Sacramento county for probably five years and in Alameda county for some time, and that is it is now having the mediations available to occur as much as two weeks before the court appearance so that there may be some time, if the mediator needs it, to put additional time in on your case and get to resolution in a less strained way.

The biggest problem the California statute has is in the area of confidentiality. There is a local option statute because it could not be agreed to in the Legislature. Either you select, as a county, to have total confidentiality of everything that goes on in the mediation process or you can opt out, as San Mateo county does, and the mediator may make a recommendation to a judge at the conclusion of the mediation as to what the results should be, and be available and subject to cross-examination. The right to cross-examination is not something that the Legislature put in the statute, but was imposed by an appellate court decision.

You can imagine in those counties how powerful the mediator is in the process when he says, "I'm going to recommend this to the judge, so why don't you go along with it and save yourself a lot of time and money?" I do not view that as mediation.

An interesting development as well is that the case law is developing to the point now where the privilege is getting somewhat perverted in that a recent Court of Appeals case decided that the privilege is not held by the participants but it is held by the court, and therefore the court, in the interests of the children, at times can waive the privilege, particularly where in a mediation somebody may have said something about child abuse or drug abuse.

Outside the court-connected mediation process there is an evidentiary privilege, which most mediators were glad to see finally enacted, that makes the mediation process confidential on the same level as an attorney-client or priest-penitent relationship.

In the Bay area in San Francisco, there is a large amount of lawyer participation in the court-based mediation process. A brief description of how that participation works is that you appear with your client on the morning at which mediation is to take place. The mediator reviews the pleadings in the file and then has a conference with the lawyers to see if they can get, in an uncharged way, a description of the conflict and what they believe their clients want, because sometimes the clients, in an emotional state, are not too clear in describing their needs.

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After that conference the mediator will begin the process, either by seeing both parties together or by shuttle mediation, seeing them separately. If an agreement is reached, the lawyers are then brought back into the process: the opportunity to view the agreement, make any changes or, if they feel it is inappropriate, to refuse to allow their client to proceed on that agreement.

It is contrary to other counties that refuse to have lawyers in the process because they believe that the lawyers will be disruptive of the process and that the clients need not spend the money to have the lawyers come to the courthouse and sit around while the mediation process is going on.

I have practised in both arenas. I tend to think the presence of a lawyer, even though it is a bit more expensive, is the better process so that the clients can get feedback during the mediation process in terms of what the legal implications are of certain agreements they might be making with the mediators, since the mediators at the courthouse are usually not lawyers but mental health professionals.

The problems with the system in California are finally beginning to be addressed by virtue of the fact that the Legislature has funded \$600,000 a year for a continuing program to upgrade the

status of the mediation process in the court system. There is an attempt now at state-wide training for mediators and there is an attempt at uniformity in standards applied by mediators in resolving custody disputes. As you can well imagine—this probably exists in Canada—there are rural areas in California that do not seem to have the same quality of service available as the urban areas do.

It is a hope that, in California at least, the mediation process will begin to expand and move in a direction that I indicated was suggested earlier by Justice King. To take a look at what that process might be, one might want to look at the state of Florida, where since January 1988, a judge in the state of Florida can order a whole divorce case to mediation and the parties must go, must participate and must pay for it.

There has been a greater increase, since that first year's experiment, in the use of mediation by family court judges in Florida. The complaints are that the litigants who can afford it will go and participate for as long as it takes, whereas those who cannot afford it will not go or will take as quick as possible to decide that they have to get out and go back to court. One complaint is it is creating the opportunity for the judiciary to avoid doing its work, which is to deal with the cases before it.

On the other hand, it is probably going to save litigants an enormous amount of money, because to do the work in mediation will get accomplished much more quickly. Generally, rules of mediation call for complete disclosure, so one will not have to get involved in the cost of discovery. The parties can agree in mediation on the use of joint experts and thereby avoid the cost of dual experts, and the process moves more quickly and informally and they can be through it with less anxiety and worry about what the future holds for them.

Obviously, a big component of what the Florida judicial system and Legislature desired was training. Whatever you do about alternative dispute resolution and whatever you do about suggesting that there be any form of ADR, I sincerely request that you give a lot of attention to training. The worst thing that can happen is to have people involved with somebody who is untrained in conflict resolution skills and unable to deal with the special problems that mediation presents.

I have heard too many lawyers say: "I settle cases all the time. I know what the settlement process is all about. I don't need any special training. I've been doing this for 20 years. Why

do I need to get any training?" Conflict resolution skills and the ability to deal with people's emotional content, which exists in every case, even in an antitrust case, need to be acknowledged and people have to be trained to do it so that the process, if it is implemented, will be one that will be viewed by both the lawyers and the litigants as one that benefits the public and is useful.

I think I will stop here for questions.

The Chair: Thank you very much, Mr Shawn. There are a number of members of the committee who do have questions.

Mr McGuinty: First of all, thank you, Mr Shawn. We began our deliberations with some presentations about arbitration and mediation in the theoretical sense, but your presentation has brought it down to its workings in the practical order. We had a very wonderful presentation also from Melinda Ostermeyer, chief deputy clerk of the Multi-Door Dispute Resolution Division from the District of Columbia, Washington.

I want to welcome you to Canada. I think your timing is exquisite. As you know, if you want to go for a walk in the park today, the mosquitoes will not bother you. I was just thinking, if in your view you think it important that we go to California to observe your operations practically, I think we would not be reluctant to go in the next couple of days, were you to impress upon the clerk of the committee the importance of that.

I found your opening comments fascinating with regard to judges leaving the bench for the purpose of getting involved in mediation or arbitration outside the judicial setting. First of all, are these judges elected people?

Mr Shawn: Yes.

Mr McGuinty: Elected, certainly. You elaborate why. Are there financial considerations, frustration with the backlog in the courts or disenchantment? I find that interesting, because—and please believe me, I do not say this in any sense of—strangely, I find myself at a loss for a word. It happened once in 1951.

I will put it this way: In Canada, there are certain perceptions regarding the propriety of elected versus appointed judges. For example, when we see political advertisements for candidates to the judiciary, usually from northern New York state, it seems to us to be very different from the kind of decorum that prevails within the Canadian legal scene. I do not say that in a condescending or judgemental but in a descriptive way.

Mr Jackson: That is how we elect our Senate.

Mr McGuinty: If we see an advertisement, there will be the sound of a husband and wife shrieking and screaming upstairs and a little child cowering on the bottom step. The ad will come on, "Come and see Joe Zilch and Pat Mahoney, specialists in marital disputes." That kind of thing, you know, is not allowed Canada. Could you elaborate a bit on this business of why the judges are leaving and what are the implications of that over your system? I find that surprising.

Mr Shawn: Not having asked anyone why he left the bench, I cannot answer the question, to know why. I can only make some assumptions. They have already put their time in for the pension, so the pension is locked in.

Mr McGuinty: That is a practical consideration.

Mr Shawn: They are probably in their mid-50s and older, they want more time with their families, they want more control over their time and they find that they can make more money doing that. In one of the organizations, called JAM, Judicial Arbitration and Mediation service, they are looking towards, I hear, becoming a nationwide organization, becoming a publicly owned corporation and just going for the gusto.

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Mr McGuinty: You cannot be franker than that.

Mr Shawn: There are all those calls. I will tell you that, as a lawyer, it is attractive to have a private judge judge your case, which I have had happen twice. They are much less abusive, they are much more amenable to your schedule and they are much more willing to put in whatever time you need them to put in on it, to meet what deadlines you have for reality, as opposed to what happens in a courtroom. They realize that if they are not kind to both sides, the likelihood of their being hired again is remote, so the perspective changes.

Mr McGuinty: That is interesting. As you know, in this country, judges are appointed, and sometimes that backfires as well. Sometimes there are nefarious reasons. We had hearings last week in Ottawa with a number of senators. I did not know, but my old friend, Allan MacEachen was telling me when he leads the Senate prayer every day the prayer is, "Now I lay me down to sleep."

About the training of mediators, first of all, they are not required to be lawyers.

Mr Shawn: Where?

Mr McGuinty: In California. Are they required to be lawyers?

Mr Shawn: No, it is a constant complaint I have had. No, they are not required to be lawyers at the court-based level.

Mr McGuinty: Okay, fine.

Mr Shawn: In fact, the way you read the requirements in the statute, a lawyer could not be a mediator.

Mr McGuinty: Could not?

Mr Shawn: Could not, unless he was also a therapist.

Mr McGuinty: Let's pursue that for a moment.

Mr Jackson: Also a what?

Mr Shawn: A therapist.

Mr McGuinty: You made some very, I think, meaningful comments on the disposition of mind that the good mediator should have. Is it possible for somebody to hang out a shingle in California as a marriage counsellor or a mediator, unregulated, without having to find qualifications? Is that possible?

Mr Shawn: Yes.

Mr McGuinty: Fine. What type of training would you suggest would be important? I know that 50 years ago you could say common sense, but the common sense of other days is uncommon sense today. What kind of training would you suggest that would be appropriate to bring about these qualities of mind?

Mr Shawn: Last summer I and four other people put on some training at Stanford University in California, sponsored by the American Bar Association, for lawyers only, in conflict resolution. It is hard to describe in a brief period of time.

Mr McGuinty: Sure, I appreciate that.

Mr Shawn: But essentially the training is in recognizing the kinds of issues that come up for people in conflict, both on a psychological level as well as on a practical level, to begin to get a sense of how to time a mediation, how to be less directive, which is less controlling, which is what lawyers are taught to be in law school, and to begin to segment a case for mediation purposes in a way such that there is a progression towards resolution in terms of dealing with the less hot issues, if we can, early on to begin to demonstrate to people that they can make agreements, that the agreements can stick and that they can then move on and build upon that sense of accomplishment to get the further agreements that finally wrap everything up.

To begin to assess imbalances in power in people, and how you are going to deal with causing a balance to occur in their power—it is not magic. I mean, we all know that knowledge is power and, generally speaking, that is the objective. It is to begin to take the knowledge base of the less empowered person and bring it up to the more powerful person so that they are on an equal level for bargaining.

Mr McGuinty: One final supplementary, please, Mr Chairman. Do I detect in what you have just said the insinuation or implication that perhaps the kind of mindset, confrontational mode which the law school engenders within lawyers may be a disposition which is quite inappropriate for mediation?

Mr Shawn: Eighty per cent, yes. I teach mediation and negotiation for the University of California Hastings law school. Law schools are becoming more aware that there are practical skills that lawyers need beyond the case-book method of determining what the legal theory and rules are. So I would say that, at least from my experience in terms of California, that they are beginning to change. I think there are four or five sections that teach alternative dispute resolution classes. There is one that is devoted entirely to such issues. I think it is a growing trend in the law to begin to realize that that is a necessary part of education.

Mr McGuinty: Okay. It is curious. I was just glancing through a book that was published in 1936. I read it for the first time in 1962. Obviously, I was just a child. It is by Robert Maynard Hutchins, *Higher Learning in America*. He laments the vocationalism as it overran the professional schools. He elaborates on that very point that you are making, that very, very point, with a great prophetic insight back in 1936.

Mr Shawn: The society that we live in has been brought to believe that the court is your vehicle of first choice for conflict resolution. That is quite different from what history has taught us about societies and their development. In most societies there has always been some sort of tribal opportunity for people to begin to sort out their affairs. The Chinese have it through the family society. The Quakers have done it.

Mr McGuinty: At one time you just had the picture of the farmers—one farmer was the horns of the cow; another farmer was the tail. Now you have the lawyer in between milking.

Mr Shawn: Right. The idea is that the court ought to be the court of last resort, and that is, you go to court for a conflict when there is no

other way of solving it, not that it starts there and then you have to shunt it off someplace because it does not belong there. We ought to begin to educate society that the court is the court of last resort, not the court of first resort, that there are other methods to resolve conflicts besides the court system.

Mr Polsinelli: Mr Shawn, thank you very much for leaving that warm, sunny California and bringing some sunlight to our deliberations.

I am interested in the training process that you have talked about for mediators. You indicated that there is no state-wide certification process for mediators and that anyone can basically hang a shingle on the door and say: "I'm a mediator. Come and give me money and I'll help you resolve your conflicts." But in terms of the court-based mediation process, what qualifications would a personnel officer who was hiring someone to work in the court-based process look for in a mediator prior to hiring him?

Mr Shawn: From a training point of view?

Mr Polsinelli: I would assume that the mediators who are attached to the court process are hired by someone in the court system.

Mr Shawn: Right.

Mr Polsinelli: So if I were a personnel officer in the court system trying to hire five mediators for a particular court, what would I be looking for in the mediators?

Mr Shawn: I would be looking for some form of training by somebody who is experienced in the area of child development issues, if we are talking about a child custody and visitation mediator and, as well, some training in conflict resolution. I think the biggest mistake that is made is that because somebody holds a degree in psychology or social work they are qualified to deal with children and children's issues. There are few people who take any emphasis in their education on child development matters in the psychological fields. Most of them look at things like couples' therapy or individual therapy for adults.

So, I would first be looking for somebody who had some child development experience in education, and I would also be looking for someone who has some conflict resolution skills. I would get two people in the office to role-play a divorce and put this person in a tank and watch him and see how he performs. After the education and after the experience, it is still a matter of—just like lawyers; there are good lawyers and bad lawyers. There are good mediators and bad mediators. You have to be

sure you have someone who can do the job. I think the best way to test it is to put them in a tank and watch them.

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Mr Polsinelli: Do you have a sufficient number of mediators and arbitrators in the system to accommodate the need?

Mr Shawn: I would say the one place that probably has enough, and that is probably because it is so big and has so much money, is Los Angeles. The Los Angeles program has even developed to the point where there are community-based programs that people can be fed into that will pick up what the court system cannot handle. So, it is kind of a dual process. The court system will go as far as it can in dealing with the problem and then shunt it off as needs be to a community-based program that is funded maybe by a grant or a social service agency and continue to work there.

As an aside, I am going to be leaving with Ms Swift some things that I got from Florida, one of which includes their suggested training program standards for mediators, so you may have something that at least describes the kind of training that Florida is requesting for mediators.

Mr Polsinelli: I think that would be very helpful. You also indicated that in California you are now either attempting to bring in a system, or at least looking at the issue of state-wide certification of mediators, or at least state-wide standards.

Mr Shawn: There are state-wide standards for—remember that we have the court-based mediator and then we have the private sector. Nobody is touching the private sector. They are leaving it alone. California is—you know, let a thousand flowers bloom. So far, I think it has been the right approach because the marketplace has been sorting out the competent from the incompetent.

Let's face it, most people, at least in the family area, who are looking for a mediator end up with a mediator because the lawyer has referred them or two lawyers have agreed that that is the place to go; and lawyers at least can tell competence fairly quickly in terms of mediators. So there has been a market regulation.

On the state level in the court system there has not been certification in the sense that the courts can hand out any kind of paper to somebody who said he was a certified mediator. But there is growing interest in seeing that there is a level of quality that is uniform throughout the state. The only way they can see of assuring that is a

training program that is provided to everybody, and your court system must send your people through it because it is under the auspices of the Supreme Court.

Mr Polsinelli: You also indicated in your comments that it is a necessary requirement, prior to appearing before a judge to have them adjudicate the case, at least in the area of family law, that some time is spent with a mediator. We have heard in our presentations that in many situations where you have unequal bargaining power those situations are inappropriate for mediation. How do you handle that or how does your court system handle that?

Mr Shawn: I found that when you look at a case carefully in terms of the whole case—not just the custody and visitation aspects—the power shifts around issues. A person who is powerful around children is not powerful around money and vice versa. So, when you talk about power, you have to remember you are looking at it in an isolated instance sometimes; that is, who knows most about the kids, who knows most about the financial aspects of the family. So it is not always the same.

What I find particularly distressing and I have heard it probably most vociferously by the New York women's bar is that women should not be in mediation because women are powerless and will be abused by the process, will not get their treatment and will be overpowered by the more powerful. Having seen women in over 100 mediations that I have done, I believe that is demeaning to women. To say that they cannot be empowered; to say that they do not have the ability to learn; to say that they cannot take control of their lives and be assertive in their own interests and in the interests of their children, is demeaning. It assumes that the only process that can effectively provide a fair result for anyone is one in which an advocate is there because the person enters the process initially powerless.

Mr Polsinelli: Mr Shawn, I would agree with you generally, but what about in a situation where there has been family violence and, you know, you have the strong possibility of one party being intimidated by another one of the parties, and that premise is based on a history of family violence. I mean, in that type, clearly it is not a question of women not having the bargaining ability, but it is a question of intimidation. And your system seems to say that even in that type of situation the case must go to mediation before appearing before a judge.

Mr Shawn: Yes, and there are various models of mediation. There is not only one way to do it.

Mr Polsinelli: Perhaps you can talk about the various models.

Mr Shawn: Sure. For domestic violence, the case I described earlier, where the lawyers come to the courthouse and then the parties go to see the mediator together, etc, that is a model that does not work in domestic violence cases. In domestic violence cases you cannot get the two parties in the room because—I think mediators are clear on this—there are a lot of psychological dependency issues going on between both parties that creates the violence in the first instance. So one possible model is that they come on different days. They come to see the mediator, they work with the mediator with regard to how they are going to deal with, say, their children in relation to their divorce, and they are never in the same place at the same time.

There is another program that says, “Well, I do not want to have that much space and time between when I see one person and when I see the other person.” So their appointments are made half an hour apart. Party 1 gets there, goes off to a room with the mediator; the other party comes there, sits there and never sees party 1 because they have been isolated somewhere else, and then the mediator shuttles back and forth between the two parties until something can get done.

Obviously, I think that, at least from my experience, in divorce where domestic violence is a component, the likelihood that it will not come out in a lawyer’s office before the process begins is extremely remote because lawyers tend to ask questions about that. Even if they know the case is eventually going to end up in some sort of a court mediation process, if they can paint the other person as the bad guy, they are going to look for everything that they can do to do that to get some sympathy from a judge. So I cannot imagine any experienced lawyer not delving into the question of violence, if not in an initial interview, at least before court papers are prepared; to begin to explore with the client, you know, what has it been like. Have you been pushed around, did you have to call the police, did you ever have to go to the hospital for something somebody did to you? So, it is not that it is a hidden issue, it is just a question of you deal with it, and generally—I was talking to Ms Swift earlier; there is some research, I believe, in Colorado on domestic violence mediations where they have attempted to follow the work and see how successful it is. Let’s remember, as I said in my opening remarks, mediation does not work for everybody. There are some people who, for psychological reasons, for cultural reasons,

for religious reasons, do not get into the process. That may also be true for some people in the domestic violence area. They may be so psychologically injured by the whole process that they cannot effectively participate in the mediation. But I do not think that is true for the general population of domestic violence because, in most cases, it is not—it is a situational process more than a conflict process.

Mr Polsinelli: You talked in your remarks about the confidentiality issue. I must admit that at the time that you were talking about that, even though I am interested in it, my mind must have been in the warm climate that you are presently experiencing in California, and I did not quite understand whether or not the mediation was confidential or whether some type of a report was prepared for the bench if a settlement could not be made. Would you go over that again, please?

Mr Shawn: California has a local option statute; that is, the particular superior court in the particular county can select, for purposes of court-based mediation, whether or not the mediator will make recommendations to the judge or whether the mediation process will remain confidential, and if it fails, nobody tells the judge anything about what went on. In the process where it is not confidential, the mediator will not only make a report to the judge but, in most cases, make a recommendation to the judge as to what the disposition ought to be with regard to the children. I would say in 99 per cent of the cases, the judges follow the recommendations. So, you do not have confidentiality.

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Mr Polsinelli: Now that I understand, or at least have an indication of how the system works, what is your criticism of that system?

Mr Shawn: Which one?

Mr Polsinelli: Either of them. Do you endorse one or the other or do you think that it should be a blend?

Mr Shawn: Remember, mediation is my baby, so confidentiality is what I endorse, and I endorse it principally because you have the greater likelihood that people will reach an agreement if they are free to discuss things in an open and honest way. If I am in a mediation as a participant, and I know that whatever I say will be held against me, I am not going to tell the truth probably. At least, I am not going to give away those things that would be injurious to me so that the mediator, if he does not like me, can use it against me. Whereas, I do not mind, in the confidential process, admitting to the mediator:

"Well, sometimes I drink a little too much, and I come home after a hard day and I may have a couple of drinks and maybe I may have one too many, but that is the past. I mean, when the kids are with me, I am not going to do it." I am willing to say that in the confidential mediation. I am not willing to say it in one where it is likely that they could quote me, because I cannot trust that the mediator will not use that against me in order to reinforce what they are suggesting as a reason why I should have less time with my children.

Mr Polsinelli: How many districts have chosen the nonconfidential option?

Mr Shawn: More than confidential. That is all I can tell you. I cannot tell you how many because I do not know.

Mr Polsinelli: In terms of the statistics, would it not show, though, that the ones that have chosen the nonconfidential option have a higher history of successful mediations or at least a higher history of reaching an agreement?

Mr Shawn: The answer is probably, but not significantly. There may be a five per cent variation, which I do not consider to be significant. I would think that most people, even in the confidential system, are mediatable and try to come to reasonable agreements given the opportunity to do that. Remember, too, that we are just talking about the court population. More people resolve issues regarding their children outside the courts than in the courts. So we are talking about those people who are unable at the git-go to get it straightened out between themselves and that now have to at least begin the court process; to raise the level of bargaining to a confrontational one because the less confrontational bargaining process did not produce a result for them.

Mr Polsinelli: Thank you. One final question. In our Family Law Act, when we deal with custody and access issues, the best interests of the child is paramount. In your system, when a custody and access issue goes before a mediator, where do mediators place the best interests of the child on the priority list?

Mr Shawn: You will hear mediators uniformly tell you, and sometimes I think in an overly sanctimonious way, that they are the only one there for the child; that their interest is the protection of the child; that both parents are only interested in what they each want to get, and that the mediator is really the only person who is looking out for the child's best interest. I think they carry that ethos in the air above them. I think when you look at their work on a practical level

they are really out to get an agreement, and any agreement that they can get the two parties to agree to is okay with them and that this general ethos of "it is in the best interests of the children" is not necessarily adhered to. I think they have kind of perverted the idea that any agreement that the parents reach is in the best interest of the children.

The Chair: Thank you very much. You have been very helpful. Thank you, Mr Polsinelli.

Mr Jackson: Joel, thank you for an extremely informative presentation and refreshing candour. I have a whole series of questions, and I appreciate that you get to the point very, very quickly. I would like to follow on the points on confidentiality because that was an area that was of concern to me. I would like to refine some of that inquiry to talk about your support for the confidentiality versus the option of reporting to a judge, essentially what went on and how successful it was or was not, and even, I suspect, it includes the attitudes of the two parties to co-operate.

Since this is about an eight- or nine-year-old process in California, what has been the evolution? Did it start out as a confidentiality-based process or did it start out as nonconfidentiality-based, and where has the movement been towards?

Mr Shawn: The movement has been towards confidentiality. San Francisco, where I principally practised, was a nonconfidentiality jurisdiction. In fact, there was a nonconfidentiality jurisdiction under Justice King, who wanted nonconfidentiality. The reason for it, I believe, is that judges wanted to cut through the amount of time that it takes to reach a decision and wanted to—looking at it at least from Justice King's point of view I think—avoid the recriminations of each of the parties getting on the witness stand, the possibility that the judge might feel the need to talk to one of the children and to kind of streamline the process and kick it out the door.

Personally, because I am a strict constructionist, I believe that if the process is going to be a court-based process that says if you cannot reach an agreement in mediation you are entitled to a trial, then I believe you are entitled to a trial. That means that this person whom you have just sat in the room with, who does not have any knowledge of your family, has not talked to a schoolteacher, has not talked to a paediatrician, has not talked to a neighbour, has not talked to a relative, has not talked to the coach on the soccer team, should, based upon his gestalt as to who the people are,

be able to reach a decision that has long-range consequences for a family.

It ain't fair. In just simple English, it ain't fair. I do not think they ought to be vested with such power and I do not think the judges ought to give it to them. If people cannot make it in mediation, then they are entitled to all the due process that the law provides them and it should not be short-circuited by a social worker who has been in the room with them for two hours.

Mr Jackson: I could not agree with you more. I would like to talk about this confidentiality and the way it has been shifted, because it holds within it, I believe, some of the concerns I have. I should tell you up front, I am a big supporter of alternative dispute resolutions but I am not in the area of family law which deals with children and where violence has been demonstrated, emotional or physical violence. So you know where I am coming from. I want to share that with you, because I feel very strongly about it.

This notion that you could move in a confidential fashion would be attractive to a whole group of people who would take advantage, quite frankly, of the benefit it would be to their case. That is natural human nature and certainly, even a terse examination of your lawyer, his opinion on the matter, would help you come to that conclusion, once you have the system described to you, that the elements of emotional and physical abuse, the ability to hide certain assets—there is a whole series of options that would make the confidential approach rather attractive. Would you not agree that there are some elements of that?

Mr Shawn: No.

Mr Jackson: Why not?

Mr Shawn: Because you presume, when one designs something for the public, you design it for the one per cent as opposed to the 99 per cent. I think 99 per cent of the people out on the street are honest. I think 99 per cent of the lawyers out on the street are honest. There is one per cent that will hide and squirm and lie and cheat and do everything that brings dishonour on people and lawyers. But I do not believe in designing a system that is to serve the public generally you base it on the fact that there are those one or five per cent out there who are the bums.

Mr Jackson: But would you not agree, even as a constructionist, that a system which is mandatory by its nature and confidential by local option has within it an opportunity for that conduct? That was my question, not whether or not this is pervasive. We do not have capital

punishment because of the one per cent of people who might get hanged in this country—and we have had two celebrated cases which have just come to light recently of wrongful incarceration leading to a death penalty—so as a civil libertarian and as a constructionist, would you not agree, would you please answer my question with respect to whether that system would be attractive to that one, three, five or eight per cent?

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Mr Shawn: No, I do not agree with that for the reason that I do not think you can hide stuff any more in mediation than you can in the litigation process, because a lawyer is going to take a look at the end product, at least under the way I see it operating. The lawyer is going to try to fit the pieces together, and if there is a piece missing, he is going to see it just as well in the mediation process as he will in the litigation process.

When I do private mediations, I require that every financial document that has any influence on anything that the parties are talking about comes into the mediation. I get five years of tax returns to look at, to examine assets that existed on a tax form and find out where they went. That includes both business assets and personal assets. If need be, an accountant is engaged by the parties to take a look at their financial assets to see if anything is missing.

I will tell you that when the mediation is concluded, there are three books provided with all of these asset documents in them. They go to each side's lawyer. I keep a copy. I believe it is important for both the husband and wife to have those kinds of documents at the conclusion of a divorce, so that if ever a question comes up four years later, when they sell the apartment building that they continue to own together and they need to know their tax basis or how it was treated, they have all that information. They do not have to go back and look for it again, or one asks the other side.

Mr Jackson: But, Joel, how do you reconcile that with the fact that the average mediator in the state of California is a mental health expert and not with your extensive training and your commitment to the process? You indicated earlier that lawyers in fact are dissuaded from being mediators, that judges upon retirement might make superb mediators, but that on average most mediators were psychology majors, former social workers, people of this ilk. How do you reconcile that that is what your market bears? I am not taking away from your abilities and the approach you take, but is it fair to suggest that each of these behaviour specialists

now has that sense of accounting and accountability?

Mr Shawn: First of all, if I have created the impression you have just stated, I created the wrong impression. Mediators in the child custody area are mostly social workers. If we are talking about financial mediations, it is mostly lawyers, lawyers who have taken the 40-hour training program of one sort or another.

Mr Jackson: Okay. I am talking about child custody. I stated up front that I want to deal with the areas of violence and child custody. I acknowledge that the no-fault divorce system in California—which Johnny Carson talked about for the last 10 years; now I am starting to really understand all those jokes of his—quite frankly, that I see the merit in. What we are struggling to determine is the degree to which the very best elements of California could find a home in Ontario, but those elements which are still under review, those elements which are somewhat suspect, those which have marginal statistical concerns, statistically based concerns, that is what I am trying to get through to.

It is in this environment where—you have indicated earlier that there is this emphasis on the human behavioural side when children are involved. To what extent are the financial security matters then therefore taken care of for the woman, for the investigation?

Mr Shawn: How did we get to the financial area? Where are we, with children or finances? I do not follow you.

Mr Jackson: We are into the children. You can only have one mediator. You cannot bring in you to do the financial elements of the mediation and bring in—

Mr Shawn: But the court does not do the financial elements.

Mr Jackson: I am not talking about the court. I am talking about the mediation.

Mr Shawn: Mediation is a court-based process.

Mr Jackson: I understand that.

Mr Shawn: And that is child custody and visitation only, not assets, not support.

Mr Jackson: So you separate those two at the court level?

Mr Shawn: Yes.

Mr Jackson: That is something new. Tell us how that works. The judge comes in and he says, “Look, there is—

Mr Shawn: No. California statute says you cannot have a trial of support or final support—

you can have interim support—or property issues until you have disposed of the child issues in the case. So you do not get to have the property divided or the support divided until you have decided the child issues. If you cannot decide the child issues in mediation, then you must go to trial and that trial gets a preference on the calendar above all other cases but criminal cases.

Mr Jackson: We did not know that. This is new to us.

Mr Shawn: I am sorry. Okay.

Mr Jackson: Mary Lou Fassel made some comments about a uniquely different system, but you see that is foreign to my thinking.

Mr Shawn: The child issues are severed.

Mr Jackson: They are and they are not. From our thought processes—

Mr Shawn: I mean in California.

Mr Jackson: Yes. Our thought processes here are that the financial security of the child is of paramount concern. That is not to say that in California it is not. I would have a hard time thinking through, making sure that the child support and custody matters are dealt with in the absence of all of the information available about what moneys are available from the party with the greater assets.

Mr Shawn: Fine. What happens in California is you are going to get a temporary order initially when the case starts. That is going to be based upon tax returns. Each party is required to disclose a tax return with respect to child support issues. You do not have any privilege any more with respect to state or federal income tax returns in California. You must disclose it; you must give it to the other side 10 days before the hearing.

Mr Jackson: We could never get that through here.

Mr Shawn: So to the extent you have filed an honest and complete tax return, those financial matters are all before the court as you walk in the door. Now, since federal returns require that you include tax-free income, that is, US government bonds and municipal bonds, that information is on the tax return too. You may call an accountant with you at that time to talk about what kinds of deductions there are on the return and whether they are cash or noncash expenses.

So the court has that to start with when you are talking about a temporary order for support. That will be heard regardless of how long you spend in mediation. The court will make some reasonable assumptions about the time-sharing, and if it

changes as a result of the mediation, then they will come back and review the support issue again.

California, I can tell you, and I think in most of the United States today, is growing to the point where children come first, always. If you remarry and you marry a woman who has three children and she is now going to have your child, who is going to be the fourth child in the household, and you go to court and say: "My ex-wife is still unmarried and has our one child. I can't afford to pay that much more money because now I have the responsibility of four other children," the court will tell you: "Your first family comes first. You made the decision to pick up this extra baggage. You figure out how you're going to pay for it. We are not changing the court order." So kids are well protected in California, notwithstanding the mediation of child support.

Mr Jackson: You made reference earlier to the process being at the privilege of the court, and that the mediation process would be sensitive to issues of child abuse and drug abuse. Are those the only two issues, and to what extent is that laid out in statute?

Mr Shawn: It is not laid out in statute. I am saying that if in fact dad was prosecuted for child abuse, the district attorney could subpoena the mediator to court with regard to those issues, and then the domestic relations judge will decide whether or not the privilege is going to be waived in favour of the testimony to the district attorney in the criminal case.

Mr Jackson: All right. Now we have a third approach to this court system. I do not want to get off on a tangent again, but when you said matters of child abuse or drug abuse are considered, who makes that determination? The mediator, when it is referred to the courts, and then it comes out in mediation?

Mr Shawn: When you say "that determination," I do not know what you mean. Let me put it this way: If I represent a mom and she comes into my office halfway into the case and tells me, "We have been working in mediation but lately my seven-year-old daughter, Jane, has been coming home and I see irritations around the vagina and I am concerned about it," first I send her to take Jane to a doctor. Then if the doctor says, "I think there has been some child abuse," we call child protective services and there is immediately a child protective services worker who will make an investigation.

If there is a determination that there has been, at least a belief that there has been, some abuse

and dad has done it, it is out of family court. It is now in juvenile court or it is in criminal court. The mediation process stops; the juvenile court process begins; the family law court drops all attention to this case. It is now a juvenile court case, and under recent case authority, the juvenile court orders supersede all family court orders until there is a determination made as to whether or not the child is going to be made a ward of the court, or that there are going to be some severe restrictions on dad's contact with the child.

Mr Jackson: And drug abuse cases or substance abuse? Do you make the distinction? You mentioned "drug abuse," and then you used an example of alcohol. Could you just clarify your point to us on that?

1130

Mr Shawn: Yes. If it results in abuse or neglect to the child, it would be handled in the same way. So if the impact of the drug abuse or alcohol abuse is on the child, ie, the child picked up the phone and dialled 911, the police came and found dad or mom laid out on the couch, they could not wake them, they were concerned about the child's welfare and they thought that was abuse or neglect, they are into the juvenile court system again and family court orders all die.

But if it did not reach that level, if it was the kind where dad maybe appeared at school or was a little drunk with a car to pick up the child for visitation, I would be in court for an order that requires that the dad not see the child unless he is on antabuse. I have gotten dads to finally say: "Yes, I can't handle it. I've got to get on antabuse."

Mr Jackson: We have an interesting twist on that. In our access legislation a wife has to prove that the husband, the noncustodial parent, was under the influence of alcohol as a reason for denying access. I just throw that in.

What about child pornographers? We had one individual indicate that there was, in California, this distinction that what is in the best interests of the child sometimes is in conflict with the civil libertarian rights of one of the adults, say, to be a child pornographer, which does not affect his or her ability to be a parent. That was the one case. I do not know if you are familiar with the case, but it was a case in California that was cited. To what extent does the mediator delve into the appropriateness of a person to be a parent in custodial matters?

Mr Shawn: It is a nonjudgemental process, so a mediator would not do that, but I do not think a

case where that was a concern of the other parent would ever reach agreement in mediation. Remember, you have to look at the fact that there is a fallback position. If in fact the case is mediatable, and I would assume an issue of child pornography is not mediatable, there would be no agreement reached in mediation. The parent who feels that the other parent is subjecting the child to pornographic activities will ask for a psychological evaluation, and the case will go on to trial.

There are issues that are nonmediatable. I do not think, just as well, if two parents came into a mediator and one said, "I want the child raised as a Catholic," and the other one said, "I want the child raised as a Buddhist," that that is mediatable. That is not going to get settled in mediation.

The Chair: Mr Jackson, if I could interrupt just for a minute, could you assist the chair and indicate perhaps how much longer you will need?

Mr Jackson: In five more minutes I will be done.

The Chair: We do have the next delegation.

Mr Jackson: Yes. I am sorry I have to raise this with you, but—

Mr Shawn: That is okay. I do not know what he is going to say to me.

Mr Jackson: You indicated the over 100 cases you have done with women, and when asked the question about power imbalances, you did not indicate whether it was or was not an imbalance. You gave us an attitudinal response, that you felt it was demeaning. Has it escaped your observation that in some cases women are in the less powerful position, whether or not it is from implied imbalance? I just wanted to get closer to that.

Mr Shawn: I would be happy to. There is always imbalance in a mediation when it begins. I have had experiences where the wife knows more about the financial issues in the family because she has run the dollars and the husband is an academic and he does not pay much attention to it, whereas on the other hand the husband, you know, squirrels away everything and the wife does not know. He just hands her a piece of paper and she signs.

Those imbalances exist in all cases, but when it is done, when the mediation is concluded, the imbalance no longer exists. That is the point that I was getting at. It is possible to empower people, just as it is possible to get a dad to begin to understand what it takes to take care of a six-month-old: that you are going to have to begin to think about formulas, you are going to

have to think about a diaper service, you are going to have to think about baths, how much time children need to sleep in the day and when they are going to be ready for the next steps in their development and how to deal with them.

Mr Jackson: Who is responsible for adjusting that imbalance? Is it the mediator's skill which develops that?

Mr Shawn: It is the mediator's job, correct.

Mr Jackson: And to the extent that there is no certification and there are no standards, how can we refine that very point? We have heard the attitude that a well-mediated settlement is one that both parties agree with. We have also heard that there is a high incidence of returning to the courts subsequent to what is "a good settlement" because those imbalances start to come back into sharp focus again.

I guess I am having difficulty with the concept that it may work to get it to a certain point, mediation, but ultimately it has to return to the system one month, one year, two years, five years, because those imbalances become better known. You know all the stories. All of a sudden another property reappears or all of a sudden the kids are being treated in a different fashion, in a fiscal way. I just wanted to get from you a response to that.

Mr Shawn: All the research you will find on mediation, which goes back to an old piece of research that was done in Maine on small claims mediations, shows that the recidivist rate for people in family law matters is higher among those cases where lawyers have settled the case or where judges tried the case than it is with mediated agreements.

People tend to accept and adhere to agreements that they make themselves, of their own free will and understanding, and live with them better than they do with lawyer- or judge-imposed agreements. I think what you have to keep in mind is that if you are going to do some sort of legislation that is going to impose mediation, you have the lawyer review process there, have the opportunity for the party to consult with the lawyer.

I know from the mediations I do that go out to all the lawyers for review, I tell the people, "One of the things you better be prepared for when you go to your lawyer to talk about the mediation is to answer all the tough questions, because if the lawyer feels that you do not adequately understand what you are doing and why you are doing it, he is going to say: 'I am not going to approve this agreement and I am not going to be a party to

it. I have now practised responsibilities that don't let me take that much risk.'"

Mr Jackson: Again, you refer to the lawyer. My head is still with this support and custody matter being done by behavioural specialists and not lawyers.

Mr Shawn: But reviewed by a lawyer. I told you, in San Francisco I go to court with my client, and when they come out of that mediation we would say, "We reached an agreement." I look at it. If I do not like it, I shoot it down.

Mr Jackson: Which was going to be another question, which was, does the judge ever know which party objected to the process?

Mr Shawn: No.

Mr Jackson: In a confidential or a nonconfidential? Or both?

Mr Shawn: In a confidential.

Mr Jackson: In a nonconfidential the judge would know whether Joel nixed the deal.

Mr Shawn: Axed the deal, right.

Mr Jackson: Just so I get a clear picture, because Mr Polsinelli was on to the various options, we have not-face-to-face on different days, that is one option.

Mr Shawn: Correct.

Mr Jackson: Not-face-to-face simultaneously—

Mr Shawn: Right.

Mr Jackson: —which is basically confrontation and bargaining done in separate rooms. I understand that process. Then you have face-to-face. I sort of lost you there. Are there more options besides those three?

Mr Shawn: Whom we are dealing with, what you do with a mediation, that is, a component of styles of abuse?

Mr Jackson: Yes.

Mr Shawn: Okay, no.

Mr Jackson: So those are basically the three.

Mr Shawn: Right.

Mr Jackson: Has California always had that system? Because I read a report which was an analysis of the California system and they were recommending not-face-to-face.

Mr Shawn: Right.

Mr Jackson: Has not-face-to-face been a component of this since they won or did this evolve as well?

Mr Shawn: I cannot tell you. I do not know enough about what has gone on across the state.

Mr Jackson: In the two minutes I have left—actually, I am stretching for equal time. The Liberals had 40 minutes, I have had 20; I am trying to stretch it to 25.

We have covered the measuring tool, mediation, common law. Do you allow for mediation of common-law relationships in California? In other words, we have a law here which designates what constitutes a marriage and matters that would be dealt with as though it were one. Our family law allows, I think, is it two years? Excuse me, it is three years. If you live with someone, then you are deemed to be married. Do you have a law similar to that in California?

1140

Mr Shawn: California does not recognize common-law marriage although California will mediate custody disputes between gay and lesbian couples.

Mr Jackson: I was going to ask you, that was my final question, because our law—I am sorry?

Mr Shawn: I can see your notes.

Mr Jackson: You can see my notes, you can see that. Good for you.

Mr Shawn: Clark Kent is the name.

Mr Jackson: Without your glasses you did that, Joel.

We have the same law as California and New York with respect to homosexual couples being able to adopt and homosexual couples having their marital status loosely defined, but they can be. That was going to be my last question. You do allow for the mediation and support and custody matters for gay and lesbian couples?

Mr Shawn: Yes, in fact the California statute goes so far as to allow people to mediate while they are an intact family.

Mr Jackson: That is interesting. I wish we had more time. This is a fascinating presenter and I do appreciate that he has come a tremendous distance.

Mr Shawn: And froze my—

Mr Jackson: Yes, the poor man has a lightweight trench coat with him. Certainly I hope we can order him a cab so he does not have to go out and hail one from this building. You will freeze to death here if you are not careful.

Interjection.

Mr Jackson: Yes, I do appreciate very much your presentation.

Mr Shawn: I must come back again when it is in its full fury.

The Chair: The chair has a couple of wrapup questions which should not take too long. The committee is looking at the whole area of alternative dispute resolution with a view to try to arrive at some recommendations for public policy for the government of Ontario. Now, we have looked at ADR from the perspective of private judging in the civil law context, family law mediation, arbitration statutes and process and accreditation of arbitrators. We have heard from the Washington, DC area in the area of multi-door dispute resolution.

One of the things we are wrestling with is a context in which to put public policy dealing with alternative dispute resolution. Could you tell us whether or not you feel comfortable that the state of California has some kind of broad-based public policy dealing with alternative dispute resolution, putting it in context in some fashion, or not? As a supplementary, other than the training component that you mentioned, what are the public policy dimensions of this whole broad area?

Mr Shawn: First of all, California has not grappled with it from a public policy point of view other than to begin at the lower level, and by the lower level I mean community justice centres dealing with neighbourhood disputes and community disputes. The rest pretty much has been handled on an ad hoc basis at a local bar association level, a state bar committee level or by individual social agencies in the community.

Ray Schonholtz started the neighbourhood mediation services in San Francisco and has trained probably 5,000 mediators in the San Francisco area to handle neighbourhood disputes. You will find that the biggest policy question you are going to deal with, if you deal with the sensitive issue of alternative dispute resolution, is, is it going to be a court-based, government-supervised operation or is it going to be a regulated field for the public domain?

I know that the biggest policy battle that goes on now with Frank Sander and ADR and the multi-door courthouse concept he developed is that you must go to the courthouse to get it and that therefore government now is supervising your conflict. One of the things that I teach my class is the fact that the problem, in part, with the legal system in dealing with people is that the legal system steals their conflict.

If someone has a beef about a contract dispute between two parties, and they are talking on a level of what the effect is on their business and before they know it it is an antitrust case and it has all sorts of wonderful labels—and I will not

tell you how many times I have represented a client when I have done a business case—you walk out of the courtroom with them, and they are sophisticated, hard-working, knowledgeable businessmen, they walk out the door and they say, “What happened?” because they cannot follow the legal mumbo-jumbo that just went on in that room.

I think that is the biggest policy question. Is it going to be a system that has a lot of law-based criteria and supervised by a judicial system that in effect is going to set the rules as to how you do it, whom you do it with, how much you pay for it and what quality of person you get? Or is it going to be one that is going to begin to regulate a field, provide the opportunities for people to do it outside the system with a system that is the system of last resort?

The Chair: The past president of the Canadian Bar Association, Gordon Henderson, was a witness last week or two weeks ago before the committee. He suggested a legislative framework and upon questioning he indicated that it might be appropriate in the field of ADR to have a self-governing body such as the legal profession has. It would establish ethics and standards of training, etc. Do you think that might be a viable component of a government policy?

Mr Shawn: Definitely. Because it is in its infancy it needs an opportunity to experience a whole bunch of things before it grows up to the point where it has to take on the responsibilities of regulation, but I think it is getting there. I think it is time to start taking a look at beginning to at least build a framework for some form of certification for people who do the work and for some opportunity for the public to begin to realize that this is a government-sanctioned activity, so that more people will opt for it.

Even today, in the United States, where it has been operating for some time, I do not think there are probably more than—except for what may be coming along in Florida now, because they have created a market—in those states where it is still kind of a free market, where the courts are not saying, “I can send you to mediation,” there are probably maybe 10 people in the whole United States who make a full-time living at mediation. That is because the public still sees it as an experiment, you know, “I am going to do it the way everybody else does it; I am not going to go over here and become an experiment.”

The Chair: To what extent is that experimental nature becoming part of the North American psyche, in the sense that it has been said that the legal system many hundreds of years ago was

represented by trial by battle and then, too, many hundreds of years by trial by the adversarial system, and that we seem to be moving towards a dynamic in society of settling disputes by consensus, by agreement and moving away from the adversarial nature of things? How deeply is that sinking into North American society from your perspective?

Mr Shawn: Slow but steady growth, but very slow. I think somebody has to give it a big boot and I think the Florida approach was one big boot. They trained 465 lawyer-mediators last year to start dealing with the idea that the courts are going to start sending it out.

By the way, this system in Florida that says everybody goes to mediation if the judge says you go to mediation, that is across the board. It is not just family law, it is commercial cases, everything.

The Chair: Are there any further wrapup questions from committee members? If not, then on behalf of the members of the committee I want to thank you very much for coming before the committee. I apologize for the weather that you found yourself in, coming from sunny California. You may be aware of the fact that the committee contemplated going down to California to do some investigative work and I think with today's weather we are sorry that we did not go down. We appreciate the fact that you came up here to share our cold weather and share some of your wisdom on this issue. Thank you very much.

LONDON FAMILY COURT CLINIC

LONDON CUSTODY AND ACCESS PROJECT

The Chair: I will ask our next two witnesses to come forward. From the London Family Court Clinic we have Dr Peter Jaffe, who is director, and from the London Custody and Access Project, Dr Gary Austin, who is co-ordinator. I will ask you each to identify yourselves for purposes of Hansard and perhaps you might add another sentence or two of your personal backgrounds so that you can put that in context for us. Please proceed.

1150

Dr Jaffe: I am Peter Jaffe. I am a psychologist and the director of the London Family Court Clinic.

Dr Austin: I am Gary Austin. I am also a psychologist and a member of the family court clinic and I co-ordinate the London Custody and Access Project services.

Dr Jaffe: We brought along some documentation to give the committee an overview of our position and some appendices with background information.

Again, I think we will highlight this morning, with your patience, our overview of the issue that we see as being before this committee and then you could perhaps review the appendices at your leisure. We recognize that the committee has had a lot of information to review already.

I should start by just expressing our thanks for being invited here and having a chance to share our perspective on this very important matter. I think we will probably start by giving you our recommendation first that we would like the committee to consider and then giving you some background as to our thinking about this issue.

Our recommendation basically is that we believe this province should make a very clear commitment to funding alternative dispute resolution services across the province so they are affordable and accessible to all families involved in separation and divorce legal proceedings.

Furthermore, we think it is really vital that provincial cabinet should direct one ministry to be responsible for funding and co-ordinating these services for the entire province.

We will take you briefly through our report, I think, underlining the importance of these two major recommendations for your consideration.

Dr Austin: The nature of the problem of course involves both parents and the children. Peter and I both suspect that the members of the committee have, in one way or another, had some experience with separation and divorce either personally or through family, friends or colleagues.

In some cases, of course, you may have come across people who have experienced a relatively civil divorce and parents able to work out their arrangements pretty much on their own before they get into the legal system, so it is just a matter of a rubber stamp at that point.

However, certainly from our perspective where we see more families in trouble, the opposite side is also very apparent. That is, with a divorce rate of around 35 per cent or so, a great number of families do experience ongoing crises that occur well before the separation, during the separation and sometimes for years later.

What we find is that families at those points of crisis usually seek out support from family, friends and others to support their particular position, and usually that is a very one-sided support that is looked at. Perhaps you have found yourself as a friend trying to stand between two

warring parents, each of them trying to have them take your side. It is an impossible position to be in.

What we attempt to do, as opposed to that approach, is to try to take a two-sided approach, that is to say, to try to understand the positions of both parents. But when they are faced with only one-sided support, often that accelerates and exaggerates the problems that their own fear and anger tend to express.

In the more traditional adversarial services, once a parent gets involved and wrapped up in that type of process, often it feels like quicksand that they fall into. That is, they get involved in affidavits and allegations which go on and on and it seems impossible to escape.

What we hope is that taking a more two-sided approach in ADR, we are able to help families avoid some of these issues.

Dr Jaffe: Children are quite often the unintended victims of these disputes. I am sure the committee here is all too well aware that what we see in our work is considerable pain and suffering, with children, in these matters. Again, I think most people recognize more and more that it is not divorce and separation per se that harms children, it is the amount of conflict they are exposed to on an ongoing basis between the two adults that they love the most.

What we see in our work are children who display some major emotional social and behaviour problems as a function of the conflict they are exposed to related to their parents' ongoing battles over custody, access and financial matters.

I guess there is a very difficult paradox that takes place because the more the parents get involved or embroiled in the dispute, the more financial and emotional energies are being directed towards the dispute and the less is available for the children, who are also in crisis and need their parents' support. So, in fact, what you find is the time the children need their parents the most, the parents are least available, and the children are forced to deal with split loyalties and end up with a lot of fairly serious emotional problems in some circumstances. These problems are visible on a regular basis from all the reports we get from schoolteachers and other friends and relatives in the community.

I think what we want the committee to carefully consider is the importance of funding ADR services, not only for the parents involved in these disputes but also for the children, who are very much the unintended, indirect victims of these disputes.

Dr Austin: Lately the committee has heard a fair amount about mediation. We would also like to talk about two other services that could be included in ADR: assessment and arbitration.

All three services provide families with an impartial, unbiased professional who attempts to understand all viewpoints and helps them arrive at some equitable solution to the family's dilemmas. Mediation, of course, is conducted here in Ontario only on consent of the parties, in which a neutral mediator will attempt to help the parents work out their own plans. Many mediation services also try to include some form of brief treatment, done usually before mediation starts, if a family system warrants it. Generally speaking, a mediator does not offer an opinion.

In contrast to mediation, an additional service is that of assessment. Assessments in Ontario can be ordered or they can be done on consent of the parties. Probably one of the most important aspects of assessment is that it helps to focus the parents, the lawyers and the judges on the most critical issues. Usually when parents get into these kinds of disputes, there are many allegations that are slung back and forth between the parents, often producing much of a smokescreen, making it difficult for them and others to understand what the critical issues are that bear on what is most important for the children.

Assessments, because they can be used as evidence in court, usually involve a very careful evaluation of a broad range of information about the families. For example, an assessor might investigate a family's history in terms of its background, where it came from and the origin of the parents' families. It might take a look at the types of involvements that parents have had with treatment agencies, the police, the children's schools and so forth. Usually, towards the end of an assessment an assessor will attempt to sit down with the parents and work out a plan.

Failing that, the assessor can offer an opinion that can be used by the parents and their lawyers to try to work out a settlement after the assessment is finished. Failing that level, then if the parents decide to go to court, the assessment can be used in court as evidence given by an expert witness. So at various stages in the dispute resolution process an assessment can play an important part in the family's conflict.

I must say that assessments tend to be referred to us when there are very severe problems: involving family violence, child and sexual abuse, parenting incompetence, or simply families that are so tied up in a Gordian knot of

conflict that there seems to be no way to mediate or resolve it just with the parents themselves.

Dr Jaffe: Another procedure that is quite often found in other points of law—for example, in the area of labour negotiations—is arbitration, which is also becoming increasingly used in the family law area. Obviously the committee already knows a lot about arbitration, but just very briefly, in family law matters sometimes two parents may decide they cannot resolve a dispute on specific issues, but they want an independent opinion from professionals whom they feel they can trust.

In these cases, these issues get referred for arbitration. To give you an example, one dispute that we get quite commonly is over Christmas access. As most of you can imagine, when parents separate, when they remarry, sometimes you may be involved with four sets of grandparents trying to work out a schedule around Christmas contact for kids. So it is not unusual for Dr Austin or myself to get a flood of referrals in late November or early December to try to work out Christmas access, as just one example.

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In these cases, we quite often try to get positions from both parents and then either try to negotiate something or offer an opinion that the parents may accept at the outset to be binding. Again, for your reading pleasure we have included in appendix D an article by a leading mental health professional in the United States, who describes this arbitration procedure in a little bit more detail. He actually talks about having some arbitration panel available to parents. Actually, in the article that we attached in the appendices, it refers to a panel made up of two mental health professionals and one lawyer to deal with some of these disputes.

Again, the important thing in our mind about arbitration is that there has to be some closure in all disputes; there has to be some sort of time line. People cannot be allowed, in my mind, to fight for ever, and arbitration is a way of bringing things to a conclusion.

I guess we do not want to depress this committee with the overwhelming needs that I am sure all of you have heard about in great detail. We want to give you some things that we saw as some hopeful signs in this province; some signs that we think suggest that ADR is maybe around the corner, not only in family law matters but a number of other areas.

One of the things that we find most encouraging in our work in London is the changing attitudes of lawyers and judges. It is very hard to

find a lawyer or a judge these days who believes that family conflict and especially issues around custody and access disputes need to be settled within a courtroom. Most judges and lawyers accept the importance of having professionals who are more in tune with the psychological impact of divorce and separation on children and families to be dealt with outside the court arena. So we are very encouraged by this changing attitude.

Dr Austin: Another very striking encouraging sign was the Attorney General, Mr Scott's, decision to set up a mediation committee in 1987 to look at the possibility of designing a model of mediation services for Ontario. Peter and I had the privilege of sitting on that committee, which included lawyers, clinicians, judges, members of the Ontario Women's Directorate and other ministry representatives.

What was perhaps most exciting about working on that committee was that professionals from diverse backgrounds were able to develop a very comprehensive model for mediation and that there was generally pretty strong support throughout the committee for it. One of the other important features was that the committee believed that ongoing evaluation of mediation services was an essential feature.

At present, the Attorney General is reviewing possible—and I underline “possible”—funding for one pilot project for Ontario. While we feel this is an important move, we also see it as much like a finger in the dike. Certainly there has been a fair demonstration, both in Canada and the United States, that mediation and assessment models have been useful to the public in settling disputes. Information, both in terms of our clinical experience and research, has shown that the parents, lawyers and judges generally find considerable satisfaction with this process.

In fact, in Canada this process has caught on to the extent where Family Mediation Canada, a federally funded association, has sponsored four national workshops and conferences, and almost every province has its own provincial association, such as the Ontario Association for Family Mediation here.

Dr Jaffe: The other, I think, very positive sign is the level of collaboration among different professionals involved in this area, especially among judges, lawyers, psychologists, social workers and psychiatrists. There are a number of very encouraging signs.

To give you just one example, in the appendices, I think on page 49, there is an example of some guidelines that were developed

by a committee made up of these different professional groups talking about some basic guidelines in doing custody and access assessments. I think one of our concerns historically has been the fact that professionals, such as Dr Austin and myself, will have very little value within the justice system if all we end up being is more fodder for the cannon, so to speak.

For example, some of you may have seen the movie *Kramer versus Kramer*, where mother gets a psychiatrist to say how wonderful she is and how bad dad is and then dad gets a psychiatrist to say how wonderful he is and how terrible mom is. Those days should be over in Ontario. That behaviour is no longer acceptable among professional associations. For example, what is laid out on page 49 in our documentation is the fact that there is agreement now that people cannot do impartial assessments based on one-sided opinions. There is a fundamental assumption in doing this kind of work that it is undertaken only by qualified people who are prepared to work within certain codes of conduct that are accepted within our professional bodies. It is also accepted, I think, related to questions that came up earlier, that each parent should have independent legal advice. No matter whether our work is that of assessors or mediators, the parents need to get their own legal advice before there is any final agreement.

I think the principles are laid out very clearly. I can assure the committee that although there is need for ongoing training of a number of professionals in this area, what we are seeing more and more is a much higher standard of practice. Individuals who are engaging in this practice without the proper qualifications or adherence to these guidelines are going to be censured by their professional bodies.

Dr Austin: I draw your attention to Family Mediation Canada's training and ethical guidelines in appendices G, H and I. There was some question here raised during the last presenters' comments about a regulatory body. Of course there is no regulatory body governing mediation or assessment. However, there are these professional associations which have developed comprehensive guidelines in terms of both practice and ethics, which are laid out in the first sample in the appendix on page 51.

In addition to that, the local Ontario association has set up multilevel membership categories with specific criteria in them that are required before one is a member in that category. The uppermost level is the practising member, where you have to demonstrate that you have compe-

tence in that area before you are admitted. Finally, the third one, appendix I, is the cover page to a set of training guidelines put out by Family Mediation Canada to judge training programs across the nation.

I guess what we are trying to say is that although there is no regulatory body yet in place, these organizations have done much of the groundwork both in terms of standards of practice and ethical guidelines.

I think one of the other important hopeful signs carries on this theme of interdisciplinary co-operation. I have attended the Family Mediation Canada conferences since they have begun and one of the striking features is the sense of co-operation among different disciplines, be they legal, clinical or judicial. I think that that co-operation has led to the development of ADR concepts at a rapid rate. In a sense what we are saying is that much of that conceptual work as well as clinical practice; and to some extent research, is already in place. Now is the time to look at some of the roadblocks that are getting in the way of the province moving further on this issue.

Dr Jaffe: Although there are many hopeful signs, the question that strikes us over and over again is: Why is there no provincial action on this issue? It is really discouraging to see the lack of any government commitment to fund ADR services except for a few pilot projects here and there. Over the last 10 years, Dr Austin and I have appealed to the provincial government on a repeated basis to try to have this issue addressed, but the current funding level can be described at best as trivial in comparison to what the overwhelming need in this area is.

The thing that discouraged both of us to a large extent is that we are ending up with a two-class system dealing with justice in family law matters. If you are wealthy enough, you can certainly get lots of legal services and go to court for many, many years. If you like to, you can also afford to get assessment and many other services. However, if you do not qualify for legal aid, the average family which is working-poor or middle-income simply cannot get the kind of services it requires. Again, if you look at this in the context of any other service in our province, we would not tolerate this in health or social services and we certainly should not tolerate it within the justice system. Obviously, I think most people would agree that justice in the area of family disputes should be universally affordable and accessible.

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To give you some idea of the plight we have encountered in raising awareness about this issue and seeking some sort of funding, on page 69 in your appendices, appendix L, we have a detailed proposal we submitted in 1986 to the Ministry of Health requesting funding in this area. We included 10 letters of support from judges, lawyers and mental health professionals outlining the desperate need for services in this area. We still have had no response. I think one of the major issues obviously is that it is not clear which ministry should take responsibility in this and we have had no luck in getting any kind of funding.

Again, just to make it very clear that we do not have a self-interest in this, the reality is that we could retire tomorrow to private practice and have a long waiting list of people who are wealthy enough to afford our services. In Toronto now, for example, if you wanted to get an assessment done, if you could come up with \$4,400 at the outset, you could end up affording a private service. If you do not have funding, you are going to have a lot of difficulty getting services in many jurisdictions, including London. So it is an issue we struggle with on a daily basis, and we find it quite difficult to watch the numbers of people who come by who cannot afford any services in this area.

Dr Austin: Perhaps we have covered the third point and we can move on to emerging issues.

Dr Jaffe: There are a number of other issues we want to leave you with, just as food for thought for the committee as you are deliberating on the critical issues in your final report. One of them I think has already been raised by Mr Jackson in questions earlier about power imbalances, certainly as they relate to family violence issues. One of the concerns obviously that the government has taken a very clear position on is that violence against women and children will not be condoned. Major changes in public policy and legislation have taken place, for example, in the area of wife assault. Wife assault is now considered a crime and police forces across the province are being directed to lay charges in cases where there are reasonable and probable grounds that an assault has taken place.

The same awareness needs to play a major role in ADR, in the sense that mediators, assessors and arbitrators need to be aware of issues around family violence in working with clients. Obviously, issues around safety have to take priority and techniques used in mediation or assessment services need to make sure that these safeguards are very much in place. Again, the mediation

report referred to previously, Mr Scott's committee, has made this point very clearly. I think we would simply add to it by saying that we think that awareness needs to be there, but there are services that can be offered, certainly to battered women and their children, to provide services on a sensitive basis that make sure the power imbalance is not further enhanced.

Dr Austin: Certainly the issues that Peter and others have spoken of usually suggest to government that one more research study needs to be done in this area, much like acid rain. We cannot seem to get any action on acid rain; we have to have one more research study. Certainly there is much research and clinical experience to suggest the value of ADR services. However, it would be important to include evaluative components in any ADR service. One of the factors that all of us I think are concerned about is the cost of government services. Evaluative research would aid in making such services most cost-effective.

Dr Jaffe: The other thing we would like the committee to think about is the need to fund collateral services that are probably going to be required in the family law area. For example, one of the things that has received a lot of publicity is the need for supervised access centres. Obviously, there are disputes that may go on for ever. There are cases where two parents can never look at each other safely in the same room. There may have to be a neutral place to have the children dropped off and picked up. There also may be basic safety issues around certain cases where a parent may have some serious problems with alcohol and drug abuse and there may need to be some supervision with the access. Obviously, it is important to maintain a relationship with each parent, but in some situations it may have to be done on a supervised basis.

Just to summarize our comments very briefly to you, I think we have entitled our presentation this morning *A Plea for Action* because that is simply what we are doing here today with this committee. We are making a plea for some sort of action in this area. We can no longer silently watch the pain and suffering of the children of families involved in these disputes.

For a decade now we have plainly requested funding in this area and basically we have gotten shuffled around from one ministry to another without being clear which ministry is really going to be responsible for proper funding and co-ordination of these services. I should say—you can probably tell from looking at us—that we are not naïve. We read the paper every day. We know that there are federal and provincial

deficits. We know there is not a bottomless pit of public funding for every kind of service that is required.

But we would ask the committee, when you make a list of priorities, very few problems are as serious as this one. In our mind, this issue requires public funding. The problems we are talking about strike at the very fabric of our society and strike at the very fabric of our next generation of families and the way in which they are going to resolve their conflicts.

We appreciate your patience in hearing us this morning and we look forward to your questions.

The Chair: Thank you, gentlemen. Mr Jackson, you have some questions.

Mr Jackson: It is a very well put together brief. There is lots of information here and it is in summary fashion. In most cases I appreciate that.

I want to dwell on what you referred to as your emerging issues, at the end of your presentation. I am familiar with your services and was present for your presentation on the Children's Law Reform Act and supervised access, so I want to get into this area in a little more detail about the notion that there is somewhat of a lack of co-ordination and responsibility between the Ministry of the Attorney General, the Ministry of Community and Social Services and the Ministry of Health. You deal with the larger picture from the best interests of London as opposed to the myopic view of just the legal elements, or just the family law elements or just the child support elements. You get the whole picture.

Could we expand a bit on that, because it seems to be a recurring theme in this very sensitive area, that there does not seem to be appropriate primacy or co-ordination when it deals with these matters. That scares up in us as politicians unnecessary costs or the reverse, gaps which people fall in.

Dr Jaffe: I think the problem, in our mind, is really one of lack of any public policy or commitment to funding this area. I think what ends up happening is that the Attorney General brings in wonderful legislation such as the Children's Law Reform Act and the current amendments that actually enable judges to order mediation services or assessment services. So other ministries responsible for services for children of families such as the Ministry of Community and Social Services and the Ministry of Health say: "Well, we did not bring in this law, you know. The Attorney General did it. Why doesn't the Attorney General fund it?"

Then—again, I cannot speak for those ministries but I can tell you the arguments that we are

in the middle of—the Attorney General says: "We do not fund those kinds of services. It should be up to the Ministry of Community and Social Services. The Ministry of Community and Social Services funds services for children of families in crisis," and the Ministry of Community and Social Services says: "We did not bring in the law. If another ministry funds it, maybe Health should fund it."

You end up in bizarre situations. For example, we have clients who help us fund court clinics in Kingston, Toronto and Ottawa. Now with those three clinics, if your dispute is at the family court level, you will get a free service from those family courts. The court clinic in London is funded by the Ministry of Community and Social Services, different funding. So we have these bizarre circumstances where we have a couple, where a husband is in London and a wife is in Kingston and they are arguing over who should do the assessment.

It is free in Kingston because Health funds it through the Kingston General Hospital as part of the Kingston court clinic. In London you cannot get it, so the client who calls us first travels to Kingston for the assessment. That is sort of an example that there is really no rationalization as to who funds what kind of services. I think the bottom line is probably that people are worried with good reason about what the ultimate costs will be. It is obvious in these days of financial restraint. No ministry wants to lay claim to this area because it could have fairly serious funding implications. It has led almost to a paralysis. There have been study committees and interministerial committees, but there has not been action because of that.

1220

Mr Jackson: As someone who has watched this process for many years, generally you get projects being developed because of the initiative of a local group of dedicated people who see, generally termed, an injustice and feel, "We would like to propose an alternative in the best interests of the client or clients." I guess various ministries respond to reward with pilot projects a project of considerable merit.

Where we break down sometimes in public policy is in integrating them. That is an area I hope this committee will get a little more deeply into, because what is being suggested is that we yet again get another pilot project. I could see my way clear to supporting an additional pilot project, but it would have several caveats that I want to deal with, because I think your brief most notably deals with those caveats in a very clear,

logical fashion. I would like to enumerate those with you.

First of all, there are elements. You reference the police, for example. The statistics that I have looked at in terms of the police intervening in family violence cases show that although an order has been put out by the Solicitor General, the response rates have not been all that encouraging, that we still have a high incidence of nonreporting of violence. Therefore as a component of your recommendation for a London pilot project—let's presume we are going to put this pilot project in London because I know you would be very interested if we did—if the Attorney General did grant this pilot project, would you necessarily see a need to ensure those guidelines are followed very clearly as being part of the solution for London district?

Dr Jaffe: Yes, but just to preface our answer, what we are saying is that this issue is beyond a pilot project. Obviously, we would welcome a pilot project in London, but I think we are really here making a plea on behalf of the whole province and the clients and colleagues we come in contact with.

In our mind, I think this issue, if I could be so bold as to say, is beyond a pilot project. We are at the point now where I think there is a patchwork of services that could be fully funded across the province, leading to development of other proposals and other services. I think it is beyond a pilot project. If we had one in London, we would follow those guidelines.

Mr Jackson: I do not wish to debate with you, nor can I speak for the mindset of the committee, but I think it is clear with the evidence I have seen so far that we are not ready to put a program in place for the whole province on this no-fault divorce system and child and custody matters. I am not prepared to recommend that. I suspect the AG will share with us, as close as he is able to before he goes to cabinet, his thinking, and he will do that with us tomorrow, I believe.

Accepting your enthusiasm for a province-wide program, in more practical terms, I would like to deal solely with the notion of a pilot project, because in my view that is what is the best that can come out of a recommendation, given the concerns we have had expressed to us. Perhaps I can just walk you through these issues which I have witnessed, heard about and seen.

The second component would be the supervised access centres. The reason I am familiar with the supervised access centre program in London—there are two operating in Ontario, both without provincial funding. Again it is argued

that it is a separate ministry. Again it is referred to in the AG's legislation, but we do not have those services in. Yet in terms of emotional and physical violence, substance abuse, a whole range of issues, supervised access centre support programs are essential.

I could see this government, for example, saying, "If we have a pilot project in London we will fund appropriately the supervised access program as part of the whole service." That is why, if that is what we are into recommending as this committee, I want to get a sense from you that this is an essential component of ensuring that at least the government has made a clear statement that these are all the umbrella of services which fill the picture, a holistic view to resolving this problem and moving it from crisis to mediation.

Dr Jaffe: I think the answer would be yes, and enthusiastic.

Mr Jackson: All right.

Dr Jaffe: I think that might be even a good example of a breakthrough in interministerial co-operation. For example, the AG funds the mediation services and helps enhance the assessment services and Comsoc did the supervised access. It may be an opportunity for some good interministerial co-operation.

Mr Jackson: I think the report that we do—at least I will be presenting a strong case to note this interministerial patchwork that requires some clearer policy direction.

The third area I want to deal with is the number of sufficient beds for the local interval or transition home. The reason I suggest that is we have had cases brought to our attention where family law courts exist in this province and where mediation is an option available to a family court judge, where he has proceeded with mediation with a resident of an interval home, who by definition cannot be in there unless he or she has been a victim of domestic violence.

We have two issues, but I would like you to focus on the access to beds. There were over 8,000 women turned away from interval homes last year in this province. We have insufficient beds in order to deal with the issue that would take it completely out of a mediated situation, and that would be very helpful. Could you respond to that and then I will move into the research area?

Dr Jaffe: Obviously, we would support some response to the shortage of beds, but dealing specifically with the issue of how victims of violence can also be involved in mediation—I

think Dr Austin may want to expand on this—we believe that there are ways to do mediation that do not involve endangering women.

For example, I think the previous presenter talked about an expanded notion of mediation which might involve subtle diplomacy, where you have two people in different rooms at the same time or having appointments on different days. But there may be cases, for example, where all the husband may want is supervised access, where something could be negotiated that would ensure the children's safety and the mother's safety but still negotiate some sort of settlement.

I guess our view is that the status quo is unacceptable. The traditional adversarial system, as it currently stands, does not do much better than mediation in dealing with power imbalances and correcting some of the wrongs in this. Obviously, just reading the newspaper every day, you can see situations where the traditional adversarial system is insensitive and bungling at best in dealing with some of these very complex situations.

Mr Jackson: Yet statistically it has been shown to us that the greatest single power imbalance is one of using violence and force. That clearly is the largest single imbalance known on this gender issue, and the results of repeat offences of violence, in many cases resulting in death, are far higher after a mediated settlement than they are after the traditional court adversarial one, where all elements are brought out in public or all elements are not dealt with in a totally confidential manner.

I understand that we are dealing with a complex area here, power imbalances that can occur in the absence of children and so on. But where physical force is being used, my personal view is that the right of the violator should be removed, and it should be the option of the battered woman to suggest that she does not wish to proceed with mediation. There should be something so that someone who, guilty of a criminal offence, does not have that option in this country to take the process of his battering and put it indoors, as it were, and make it confidential. It was part of what you heard from Joel in California, that this whole process could be barred from the courts and awareness under certain circumstances.

Dr Jaffe: I think there are probably two points on that. First of all, the Attorney General's committee did not recommend mandatory mediation in the province. What it recommended was a mandatory education session, which could be

held separately with each parent, so at least they could understand what service they are either accepting or rejecting.

Second, I think there is an important distinction to be made about attempting to mediate a family violence issue, which has been attempted in the United States and which has been attacked by many feminist groups, and I think rightly so, that probably the legal response to the actual issue of family mediation needs to happen in a courtroom. There need to be consequences for violence through the legal system.

However, the other issues in the family system—custody and access to the children in a separated family situation—can be addressed through mediation in many of these cases. But the actual acts of violence need to be dealt with as a legal matter, so if we have a case come through to us where there is family violence, what we might do in an intake process is to recommend to the wife, or at least put her in touch with services that will help to support her through a legal method of addressing the assault.

We might, once those protections are in place by the court, then pick up and try to help the parents, likely in separate sessions, unless of course the wife is agreeable—some women actually like—“like” is probably the wrong term—some women want the opportunity to sit in a face-to-face session with the ex-husband, because they then have a chance to test out their own sense of growing power.

I think it is important to keep that distinction clear. We are not in any way suggesting that family violence issues themselves be mediated, but rather the custody and access issues around the children in a family where there has been violence can still be approached for mediation, or failing that, certainly from the point of view of an assessment.

1230

Mr Jackson: There is the assessment and then there is the ongoing program. The concern I have is where you have a violent situation, the mother takes the two children and goes to the London interval house. She only has a certain number of finite days she is eligible to be there, then they have to throw her out. She is no longer eligible for funding.

To the extent that we can entertain a process that helps the family, it seems to me that it is structured or it is bound by her ability to have access to a safe and independent living situation. We know the cases of so many battered women who return home because the program has this breakpoint, and that is it. You are no longer

funded, so you have to go. If you can find a friend in another city, which is invariably what happens—all the mediated efforts up to that point are for naught in one sense or another in terms of reaching a conclusion. They may have helped the woman understand her power imbalance or have given her some intrinsic strength, but in fact that is why I want to return that back to this notion of the integration.

Until we can come to that understanding, we cannot just have a blanket statement about: "Where there are any elements of violence, it will be dealt with. Don't worry about it." In fact when you even suggest that in some instances there might be some opportunities for mediation, that breaks down if the woman has to return home. She has to rely then on the police for a peace bond, which may or may not be, depending on how thin the ranks of the police are in order to deal with domestic matters. There are a whole series of complexities there.

The final one, because I am using up a lot of time here, is the notion of child support staff at shelters, where we have children who are preschool age, where the government has indicated that is a custodial function, and yet there is a very strong need for the interventions your group has advocated for. So we have in those situations psychometricians, child psychology, not just assessment but ongoing work to assist the child in that environment so that he or she can start the process of repairing and healing, which is an essential component.

I am sorry I am overstating this integration thing, but if there is anything I have learned in the last three years on this agenda, it is that we are just focusing on the court and not on the human circumstances, whether it is London or any other city. You have come so close to having one of the best programs, I would just hate to blow it unless we get all that point of integration.

Dr Jaffe: I think your last point is really essential. I think Dr Austin and I were sort of focusing more on the issue of ADR in regard to custody and access disputes and family law matters, but I think your comments are essential because I think our assumption is that whatever services develop, whether in London, North Bay or anywhere in the province, they have to be integrated into a caring community where the police force is doing its job and laying assault charges, where there is protection, where there is shelter. So our assumption is that our services, or services like ADR, work when they are integrated into a caring community. I think your point is a really important one to make.

What you should recognize, though, when you are looking at ADR compared to the traditional adversarial system—in London recently a woman did go to a shelter with children. Her husband then went to a lawyer and said: "She's lying or exaggerating about the abuse. It's not true. Furthermore, the shelter may not be a stable environment for my children." He went to court and successfully challenged the custody application through the traditional adversarial mode.

I think we should always bear in mind what the status quo is. The traditional adversarial system compared to ADR is not always very effective in being sensitive to these issues and dealing with issues around violence and power imbalance.

Mr Jackson: My final question, quickly: I appreciate the point you make on evaluation of services and research, because we have heard that recurring theme. Even the California system is under massive review as an evolutionary process, yet there should be a very strong component of any program considered in Ontario that evaluates access points, whether it be on the basis of violence, whether it be on their ability to pay, whether it be in terms of repeat offences or breakdowns in disputes, that analysis component is an essential part—well, it is a critical part of the pilot project, but an essential part before we make any final policy moves for this province and not a lot of people have dealt with that issue extensively.

We, as a committee, have made inquiries and found out that there is not a lot of research data available which is domestic, which is here in Ontario. It would be very helpful if any recommendations contain that and you have highlighted that.

You may want to just generally respond to my previous question, and I thank you for your attending today and the chair's indulgence with my lengthy questions.

The Chair: I do not see any other questions. I have a couple of brief wrap-up questions. Last week, we had a witness before us, I believe it was Mary Lou Fassel, who is the director of legal services for the Barbra Schlifer Commemorative Clinic, who expressed some real strong reservations about mediation in the family context for a number of reasons.

One of the concerns that she had was the fact that mediation now in some places in Ontario can start and go on quite a long time without any independent legal advice. An agreement is consummated a number of months down the road and it is then turned over to the lawyers for technical drafting and there are a lot of concerns

that are raised by lawyers at a subsequent time. She indicated that it might be helpful to have a regulatory or legal requirement in Ontario that, before the process of mediation starts, each party have the benefit of independent legal advice. Do you have any comment on that observation?

Dr Austin: We would strongly support that. Right now, we can take off-the-street referrals for mediation. One of the first steps we take with the parents is to strongly advise them to obtain a lawyer. Then we have them sign a form that we have in fact advised them at that step. So our position would be to strongly support that position.

The Chair: I have another more general question. I think you heard some of the questions to the previous witness that this committee is concerned with more than ADR in the family law context. I wonder what observations you might have on the value of ADR generally or some cautions on ADR in contexts other than family law, particularly the type of thing that exists in Kitchener with the justice initiatives clinic that they have there, which you are probably familiar with. Do either one of you or both of you have any comment on generally how you perceive ADR in Ontario, the usefulness of it and what we as a committee should do with it?

Dr Jaffe: I think just some general comments. I hardly meet anyone who does not support ADR services. I mean, even most lawyers and judges, most people who have the strongest investment in the current justice system, realize there is a need for an alternative, something that is affordable and hopefully more effective. So in general, I think, through our work both in London and in our travels around the province and over the rest of Canada, we see nothing but support.

I guess the one point I would make when you look at other services in other areas of law; what strikes us quite often is that there is a greater sensitivity to time lines that are not really being used in the family law area. For example, if you take any board of education, let's say, in any community across the province, if there is any breakdown in negotiations, you can call somebody right away and you can get a mediator appointed within a certain period of time. It is guaranteed. Furthermore, if you need a fact-finder, you get a fact-finder appointed and there is a certain deadline; you know, in 15 days a report is made public and there are a number of things that follow.

I think what saddens Dr Austin and myself is that these same kind of time pressures are not

brought to bear in some family law matters because what we see quite often are disputes that go on for ever. I mean, we have families who come with affidavits several inches thick, that go on for ever. There are arguments over who should sit where during the grade 6 graduation ceremony. They come back on the grade 8 graduation ceremony and it just goes on for ever. In my mind, there are only finite resources. What I would like to see are some of the same innovations that happen in labour relations being brought to bear in family law matters where people are told, "You're going to be in court on this date. There'll be a referral. There'll be a report or there'll be five sessions of mediation." I think what really concerns us is things just go on and on for ever. There is no closure on these disputes and what you end up with in our mind are families at war and then families in limbo.

1240

Most people when they describe their experience in the legal system; the only thing they know about are adjournments. Without making an unfair characterization, most people describe their experience within the traditional adversarial system as waiting for something to happen, getting ready for something that never takes place. But in the meantime a lot of money is being spent. A lot of emotional and financial resources are being drained. I think our recommendation is to review some of the innovative things, for example, in labour laws that could help make the family law area much more humane and much, much better defined.

The Chair: One final question. Two weeks ago, Ernest Tannis, who is a lawyer from Ottawa and the founder and co-ordinator of the Canadian Institute for Conflict Resolution, was a witness before us and shared a lot of ideas and experiences on the whole idea of ADR. He is somewhat of an expert in the field.

I want to quote to you from the transcript of his testimony, and basically the question is addressed to both of you as educators because the issue really that I am addressing now is the question of education and how and when we should start dealing with the whole issue of conflict resolution. Mr Tannis said:

"Thanks to the Ottawa Board of Education and Woodroffe High School, which is in your riding," of Ottawa West, "the first peer mediation program was launched in Canada at Woodroffe High School. Ivan Roy was the vice-principal. He was totally against this...." Later on he goes on to say, "At the end of two and a half years, the bottom line of this story is that Ivan

Roy has now resigned from Woodroffe High School, and starting this June he is spending the rest of his life promoting school programs in Canada on a full-time basis with our institute. He saw it work. The climate of that school is different. The principal has said that suspensions are down one third."

Now would you support in the province of Ontario the Ministry of Education trying to establish some sort of core curriculum that deals with this whole area of conflict resolution, and do you think from a societal point of view that is where we are going and where we should be going?

Dr Jaffe: Yes. I think that is the direction. I mean, in a number of areas; for example, in the family violence area there are now a number of programs being developed across the province to increase awareness, for example, among teachers and also students, that sometimes violence occurs in the most intimate of relationships. When you talk about violence, you worry about violence against strangers. The reality is, the most violence happens within the home in this province.

So there is a big thrust currently within the Ministry of Education on the sole issue of looking at increasing awareness about violence and looking at alternative forms of resolving conflict in relationships. Obviously, if you work with conflict resolution starting in the elementary grades, you would be making some major inroads in terms of changing attitudes and looking basically at developing more skills towards resolving conflict.

There have been pilot programs, I know, throughout North America as early as grade 2 where they have actually taught kids in a playground to be mediators and resolve playground disputes. Basically, people analyse sort of what are the most common elements of playground disputes around violation of rules, or somebody stealing somebody else's soccer ball,

and they have trained kids at an early age to be helpful in resolving conflict among peers. so I think it is an exciting new area and it would be very helpful, I think, for the committee to make some broader recommendations, looking at primary prevention.

Dr Austin: I think it was expressed earlier in this committee. There seems to be a zeitgeist for conciliation, be it provincially, nationally or internationally. We seem to be in that time period.

I think it is important that the committee look at these broader issues, such as the peer mediation program and other ways in which ADR can be used throughout the province, but at the same time I think it might be important to prioritize where the government places its attention, particularly in the direction where the greatest expertise and need happens to be at the time.

Certainly in this time of restricted budgets, obviously, putting the funding in areas such as the family where there is considerable expertise already available I think is important, probably most important. Broadening the view to include other types of ADR programs, I think, also is important, but it is a matter of perhaps this committee helping the government set priorities.

The Chair: Thank you, Dr Jaffe and Dr Austin. I do not think we have any more questions for you. So on behalf of the members of the committee, I want to thank you for coming before the committee today. I am sure that your brief and your answers here will be very important to us when we create our final recommendations to the Legislature and the Attorney General. So thank you very much for being with us.

The committee is adjourned until 2 pm this afternoon.

The committee recessed at 1245.

AFTERNOON SITTING

The committee resumed at 1447 in room 151.

The Chair: The standing committee on administration of justice is in the process of a study on the issue of alternative dispute resolution. Our first presenter this afternoon will be Robert McDonald, who is Deputy Minister of Correctional Services. If you want to proceed, we probably will have some questions afterwards.

MINISTRY OF CORRECTIONAL SERVICES

Mr McDonald: I thank you for the invitation to attend the committee hearings. I have prepared a short document of about 10 pages which has been distributed. I will perhaps speak to that document and paraphrase it as to our perception of this subject.

Alternative dispute mechanism, we understand, refers to a procedure that provides alternatives to resolving disputes that are normally used before the court system. These methods may include arbitration, mediation and a wide range of variations or offshoots. This paper is designed to provide an overview of how the Ministry of Correctional Services utilizes alternative dispute mechanisms to fulfil its mandate more effectively and to enhance its relationship with the clients, the employees and the general public.

What we will try to do is have a small background and then deal more with what corrections has to do with this subject rather than the overall system. Perhaps as background I could indicate that the committee is probably aware that the alternative dispute resolution movement was initiated in the United States in an effort to address problems associated with the court system because of congestion, excessive delays and rising legal costs. These myriad of forums in the United States included settling of labour and commercial disputes, family court mediation, custody and visitation questions and a range of criminal law settings.

Of several types of systems in the United States, one was the deferred prosecution model. In the last 1960s and early 1970s in the United States there was a proliferation of these types of programs designed to delay prosecutions of criminal charges while selected defendants completed specific conditions. There were projects like Project Crossroads, the Manhattan court employment project, deferred prosecution, and

in this area there was probation, job placement, attendance at group counselling and restitution.

These were for minor offenders or first offenders whose background or social adjustment impeded regular employment. They had to fulfil the full conditions of their alternative measures, and if they did not, they proceeded with the prosecution before the court.

In Canada we have a bit of a safety net system, with social services and health and a range of other areas. This allows our system not to assist in dealing more with socially disadvantaged people because there are other systems in place to do that.

The deferred prosecution program attempted to avoid costly and lengthy legal processes.

The second type of alternative is dispute settlement and conflict of resolution in the community. The urban court project in Boston was an example where clients in the program had interpersonal conflicts such as might arise among families, neighbours, landlords and tenants. In some programs, minor criminal matters were also placed. Participation was voluntary and referred sources and two or three persons was a hearing panel and attempted to satisfy and resolve the disputes between the parties. If agreement was obtained, it was written down. The two people who were engaging in the dispute signed the agreement. Then there were minor disputes and charges without being engaged in the full apparatus of the civil and criminal justice systems.

In Canada, alternatives have progressed more slowly than in the United States. Our system tends to deal with this sporadically and lacks a cohesive framework. In general, as noted by the Canadian Bar Association Task Force on Alternative Dispute Resolution, there are seven main areas in which these alternative processes are being utilized to some extent or the other, in labour, family, criminal, environmental, native, commercial and public law.

In general, the dispute resolution process in Ontario involves the court system. This is particularly true in the area of criminal justice where attention to the rights of the accused has for the most part precluded the use of alternative measures.

A number of other mechanisms in Ontario has been used to resolve certain types of disputes, alternatives to litigation, such as the Workers' Compensation Board, the Criminal Injuries

Compensation Board, the expansion of no-fault insurance, the Ontario motor vehicle arbitration plan, and most recently, the commencement of negotiations with native organizations to resolve disputes by negotiation rather than through the courts.

Finally, the Zuber commission's Report of the Ontario Courts Inquiry of 1987 stated that mechanisms for resolving disputes outside the courtroom should be used to the fullest extent possible because they spared the parties the high costs involved in going to court and the trauma of the trial, and that voluntary arbitration mechanisms should be used to augment the court system. The commission also recommended that judicial establishment of seminars and continuing legal education be used to educate the bar as well as the general public acting in this area.

The Ministry of Correctional Services makes extensive use of a number of procedures and programs that resolve disputes without resort to the courts. I have taken the liberty to expand slightly on the criminal justice system to explain what we do that we consider alternatives to dispute resolution before the court.

Four general categories identified are program delivered to clients; inmate misconduct process; community involvement in decision-making; the resolution of labour disputes. What I would like to do is merely highlight some of these items and perhaps have questions afterwards if the committee so desires.

Program delivery to clients: Basically alternative measures are used in the implementation of programs to young people who are charged with an offence where the Attorney General has authorized such a program in a province under the federal Young Offenders Act. An alternative measures program allows the young person charged with an offence an opportunity to avoid court proceedings by completing an agreed upon sanction.

The courts held that under the charter each young offender in all of the provinces should be afforded this right of alternative measures. It was agreed by the court that each province could designate what type of offences it would ascribe to alternative measures and some of those offences, from province to province, differ.

Young persons facing qualifying charges are encouraged to talk to parents, defence lawyers, legal aid counsel or their lawyers prior to entering the program. Following the successful completion of alternative measures, the charge against the young person is withdrawn. Examples of alternative measures completed by young of-

fenders include restitution of the victim, community service orders, participating in organized community activities and completing crime prevention systems.

The other area in this alternative measures—the federal government has the Young Offenders Act, and in the Young Offenders Act the courts may prescribe two different types of custody, secure custody for a young offender and open custody in which the young offender would live in the community in a residential setting. If the correctional authority managing the sentence wants to progress that young person into the community in a quicker way, he must go back to court and take up the time of the court. We believe that the federal government should amend the federal legislation in this particular area to allow the judge to have one custody order and let the correctional authorities, which are provincial, across the country manage the sentence from secure to open to community, all the way back to rehabilitation.

The ministry in the first year of activity had about 1,200 requests that received ministry alternative measures and 97 per cent of these young persons were successful in completing their alternative measures, rather than facing the whole court process—the cost of the court, the cost of legal counsel and the like. The Ministry of Community and Social Services which looks after the 12- to 15-year-olds—they are more children than youth—has a like amount of success in this area.

Diversion programs are similar to alternative measures for young offenders. A good example of diversion in the criminal justice system is what we refer to as adults in diversion. It is not being tried very much in Canada. It was used in Quebec and a couple of other areas. With the exception of alternative measures, diversion projects are very rare. This may be due to the emphasis on the protection of individual rights and ensuring that the accused persons are ensured a full public hearing before being subject to any sanctions. There is a wait between the rights of the individual to a hearing in court with counsel, versus telling the person perhaps he should plead to the account and not go to court. "If you fulfil your community sanctions, your offence will be wiped out."

Despite this reluctance to develop alternative methods of conflict resolution in the criminal justice system, there are a number of reasons for considering the development of diversion programs. These include the criminal justice system, including the courts and correctional

institutions, which is overloaded with persons accused of minor offences and those whose crimes are motivated by interpersonal conflicts and those in need of treatment.

We have a great range of people who are in our system because they cannot read at the grade six level. We have a great range of people—40 per cent of our offenders do not read above the grade six level. If you cannot fill out an application for employment and you are frustrated, you have a big problem. Now, not all of them are that way. We have our very bad ones too. But we have a great range of people who are ill, who cannot read, who have no skills, who have been in the children's aid society system with their parents since they were eight, and there is a range of things that we think, for minor offences, a diversion program could be used.

Those individuals are effectively dealt with outside the criminal justice system since criminal sanctions cannot solve the problem. If you give a person 90 days to solve his literacy problem, he will not solve the problem. If you give a person 90 days because he stole apples and oranges and he happens to be a minor schizophrenic because he does not take his pills and he lives in a boarding house in downtown Toronto, you will not solve the problem. It goes on and on and on.

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We are not saying that in our whole system, of the 75,000 people we admit each year, that is the case with all of them, but there is a rather sizeable percentage we think could benefit from such a diversion.

Alternatives may be developed without impeding such objectives of the criminal process as the protection of society, deterrence or reinforcement of community values. By and large, these people are out. In 21 days, 35 days, 60 days or 90 days, they have never really been dealt with in a treatment mode or in a learning mode or an education mode. They are going to be put in prison and they are processed and they are let out. They have their three meals a day and they may get a little healthier because they eat regularly, but it is not curing the fundamental problem.

Diverted individuals may avoid the trauma attached to the label of "criminal" and obtain treatment and social services that might not otherwise be received from the corrections system. When we have people in our system who are serving 120 days or more, up to two years, it is a different process, but there is a great range of people who are serving less than four months, who are the people, quote, in this socially disadvantaged group. There could be some good

benefit by incrementally putting in such a program.

There are possible disadvantages and dangers in diversion programs that must be avoided. Prior to diverting an individual it is essential that there is enough evidence to justify the laying of the charge. It is not good enough to pick somebody up on Queen Street in Toronto and say that he is, quote, a criminal, and let him plead that he did something he may not have done. There must be proper evidence. Entry into the diversion program should be voluntary and the participation of legal counsel—it should be necessary to ensure this. The target population for diversion programs may be individuals with little risk to the society or the community and who have received noninstitutional disposition by the court.

The diversion should be very careful in not widening the net, just by picking people up, which was the case some years ago where you would have a sweep in downtown municipalities and pick people off the street who were vagrants and so on. We have to be very careful we do not get back into that mode.

Given the overcapacity pressures presently being experienced in the Ministry of Correctional Services institutions and the number of individuals being incarcerated for minor offences or fine defaults—a lot of people with fine defaults are economically disadvantaged and cannot pay them anyway—the ministry believes that developing a diversion project may be beneficial. As long as it protects the rights of the individual and these are scrupulously protected, we believe there is some merit in doing a diversion program incrementally in the system.

We really also believe that a diversion program for native offenders in remote localities would be a perfect start in doing that, so that the justice system, along with the native political groups, would begin to accept responsibility for adjudicating in their own jurisdiction.

Inmate misconduct process: Inmate misconducts are dealt with through internal institutional processes, rather than through the courts. In this way, misconducts can be dealt with fairly quickly and without placing additional pressure on the system. The ministry derives its authority to adjudicate inmate misconducts from regulations under the Ministry of Correctional Services Act.

If an inmate is deemed to have committed an offence listed in the regulations and it is an indictable offence, in which the superintendent has consulted with the crown and the crown has not proceeded with a charge, then we deal

internally with a system that works rather well. When the prosecutor commences an action against an inmate, for which we have called the police in, then the ministry discontinues the internal disciplinary action related to the alleged misconduct.

What we mean by that is that if somebody hits someone with his fist and breaks his jaw, it is an attack as if it is an attack in a bar or on the street. If somebody pushes someone or there is scuffling in one of the ranges, or if somebody spits through the bars or somebody uses profanity, etc., we handle that in an internal way by segregating the person, by taking disciplinary action, by taking away benefits, by losing remission of a sentence.

By and large, we have, for example in the Toronto Jail, about 800 misconducts per year. So if that represents about 18 or 19 per cent of the system, we are dealing with 4,000 to 5,000 misconducts per year. We call the police in perhaps 10 per cent of the time, and we consult with the crown on grey areas maybe three or four per cent of the time, but with 52 institutions that is a lot of consultation. But it is an alternative dispute mechanism that has served very well over the last period of time.

An inmate found guilty of a misconduct is subject to penalties set out in the regulations. Only misconducts of a serious nature should result in close confinement or segregation, loss of remission or suspension of eligibility to earn remission.

The deputy minister reviews the superintendent's decisions on request where inmates ask for that adjudication. There is an appeal process that they go through if they feel that they have not been treated fairly, and they are allowed to call witnesses inside the institution, their fellow inmates, other correction officers, so that there is an airing immediately, and this airing usually takes place within two or three days of the alleged offence so that it is fresh in people's minds.

The Supreme Court of Canada has ruled that misconduct allegations do not constitute offences similar in nature to criminal proceedings such that an inmate is placed in the position of being tried twice. So if it goes before the court, we discontinue our process.

Community involvement: In fulfilling its mandate, the ministry becomes involved in projects and programs that will generate interest in the community at large, sometimes significant interest. Examples are the opening of a new group home for young offenders or adults or the construction or expansion of a prison or a correction centre. It is the ministry's policy to

inform the general public of its actions and to answer concerns that might arise in the public forum.

The ministry believes that through a process of dialogue with the public, concerns over the ministry's activities can be answered and as a result, the ministry will gain the much-needed support of the local community. The public interest, though, might be set out under the Planning Act, that the province of Ontario has a public interest in making sure that disadvantaged people are housed in the community. The public interest could be defined by a phrase in the Planning Act that whether you are mentally retarded or whether you are a minor offender or whether you are a schizophrenic or so on, you do have some rights to be housed in the local community that you live in, so that you do not have a continual confrontation between the community at large and the ministries and/or the transfer payment agencies that do that kind of process.

Resolution of labour disputes: A number of methods are employed to resolve labour concerns within the Ministry of Correctional Services without resort to the court system. One such method is the collective bargaining process. The committee is aware that the collective bargaining relationship between the government of Ontario and the Ontario Public Service Employees Union is governed by the Crown Employees Collective Bargaining Act and the Public Service Act. The Human Resources Secretariat of Management Board of Cabinet co-ordinates the collective bargaining process with the government.

The CEBCA provides that, prior to the termination of a collective agreement, either party may give notice to the Ontario Public Service Labour Relations Tribunal of its desire to renew the contract, or may go to mediation or finally go to arbitration if it is not satisfied with the range of wages and the like.

The ministry has been involved in the process on a number of occasions, and more occasions than we would like to discuss. Most recently, the failure of wage negotiations between the correctional officers and the Human Resources Secretariat, even though they had signed an agreement that they recommended to the membership, caused us to proceed to the court for an injunction for illegal strike, and it became a dicey situation.

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Another mechanism for resolving workplace issues is the grievance process. In general, the grievances of bargaining unit employees are dealt with in three steps: On the floor, with the

superintendent and at the deputy minister level. Then it goes straight through to a board. The Grievance Settlement Board deals in a full way with those grievances, and the decision of the board is binding.

The ministry currently has, and is expanding, two committees in its 52 institutions as an alternative to going through this process or trying to defuse the timely and costly process of going through all the way to the board. These committees are co-chaired by representatives of the union and management and operate at institutional and ministry levels.

The mandate of the employee relations committee is to discuss such topics as staffing levels, scheduling and overcapacity of institutions, where the health and safety committee deals with questions such as the heating and ventilation of buildings and the handling of dangerous chemicals and water and those kinds of things.

Practical experience has led the ministry to believe that there are deficiencies in the present system for resolving labour concerns, particularly in the grievance process. From the ministry's perspective, the difficulties include:

Internal grievance procedure is inadequate in resolving disputes between union members and management. As a result, a significant number of grievances proceed to the Grievance Settlement Board.

The procedures of the Grievance Settlement Board are complicated, time-consuming and costly. The costs of a grievance hearing may include legal fees for both the ministry and OPSEU, but not for the individual grievor as in the civil litigation process. Replacement costs to allow the grievor and institutional management staff to attend the hearing are borne by the ministry.

Unlike civil courts, the GSB does not have the power to assess costs against the parties.

There presently is no device to screen or monitor the grievances that proceed to the GSB. As a result, frivolous grievances become involved in this costly process. There are some examples of grievance allegations:

A grievance alleging a health and safety violation was filed by a correctional officer in respect to the location of a staff washroom, and it went all the way to the board.

A correctional officer claimed that the meal allowance was improperly denied while attending a course held only a short distance from the regular place of employment and after all participants were clearly advised in separate memorandums. These lists go on and on, and it

costs both union and management a great deal of money to go through that process.

The ministry believes that there is no need to improve the mechanism for settling disputes in the operation of correctional institutions, but changes to the grievance process could be made, such as:

The union could establish a screening process to ensure that only serious issues proceed to the hearing stage. There is no such mechanism. The union has a mandate to take any grievor's grievance directly to the board.

Management could also establish a screening mechanism aimed at reinforcing the mechanisms for dealing with problems that arise in the operation of an institution. In some of our large institutions, we do have that mechanism, but in the smaller ones we do not.

The union and management could establish a joint screening process for grievances before they go to the board.

The establishment of a pre-hearing settlement conference. Prior to a hearing, a neutral party could meet with the parties to discuss the issues and offer an opinion as to the likely outcome.

Building in possible costs to the grievor or the union or management if it defends a frivolous grievance and so on.

Consideration could also be given to creating separate bargaining processes for the government workers who are involved in a 24-hour work operation rather than a nine-to-five, those who are in shifts working 365 days of the year, 24 hours a day. There could be a separate process and the Ministry of Correctional Services, the Ministry of Health and the Ministry of Community and Social Services, who have these institutions, could be involved in that process and deal more with it as an industrial entity rather than as a civil service entity.

In conclusion, the Ministry of Correctional Services believes in developing alternative dispute resolution mechanisms whether it be in the criminal justice system, in the community or with the labour force, as long as it does not widen the net and cost us more money. We think that some of these mechanisms, if they are simple, could be cost-effective and will cause minor disruption to the system. The ministry also believes that it should proceed with policies that have openness and co-operation when establishing the new programs and facilities in the community.

We would like to thank you again for inviting us to come today. We will be happy to try to answer any questions that may be forthcoming.

The Chair: Thank you, Mr McDonald. We have a number of questions for you and we will start with Mr McGuinty.

Mr McGuinty: Thank you, Mr McDonald. Of the 75,000 admitted per year into our 52 institutions, what is the average time of length of confinement?

Mr McDonald: Of the 75,000 who are admitted prior to conviction, there are about 52,000 that go into institutions or have probation orders. The average day stay of male is 78, give or take a half a day, and female 51. That is the weighted average against those persons who may be there for two days for serving a nonpayment of fines to those at two years less a day.

Mr McGuinty: Is that not discriminatory?

Mr McDonald: No. It is the type of offence. It is adjudication against the type of offence rather than the gender.

Mr McGuinty: Okay. I assumed that. I just wanted to see if Joan was listening.

Mrs Fawcett: I was.

Mr McGuinty: I am delighted, Mr McDonald, with your allusions to the problem with illiteracy. Actually I thought that the percentage of the illiterates in your constituency was much higher than that, but it depends upon that elusive definition of literacy.

With regard to the illiteracy problem, you literally have a captive audience and you have programs. It was my pleasure to deal with the Honourable Alvin Curling in his capacity as Minister of Skills Development. There is a great, a wonderful initiative and imaginative way of dealing with illiteracy. For example, in Ottawa we can advertise a program for the illiterates on Monday and Wednesday evenings at a high school or Algonquin College and you will get a certain clientele; or if you open a storefront operation, such as Mr Curling was involved in supporting in Rideau Street and you draw upon the fine talent of the Rideau Centre, which is a large dropin centre for nefarious types, you go where the action is and you draw them in. Wonderful work is being done there. We are very proud of that fine work.

Do you have an internal program for the literacy training of your clientele?

Mr McDonald: Yes, there are two programs. In the institutions we have literacy programs in most of our institutions. In the 20 institutions, the large ones at present, primarily the 10 correction centres where they have long-term, we have a range of literacy programs, education programs, school upgrading under section 25 of the—

Mr McGuinty: Do you have people on staff or are they dropin staff on a volunteer or part-time basis?

Mr McDonald: No. We have full-time staff, either under the provincial Education Act or with local schools boards in which in the 10 correctional centres and the four youth centres where they are serving long-term sentences, we actually have schools. In the 10 large detention centres and half of the jails, we have small literacy programs with volunteers where we high-grade people who are willing to do these things and will take on the responsibility later while on probation to continue one-on-one reading with a retired school teacher or—

Mr McGuinty: What are the responses to your programs from your clientele?

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Mr McGuinty: What are the responses to your programs from your clientele?

Mr McDonald: It is very difficult. We have a great problem in getting people literacy-ready. You say that Mr Curling had to get people work-ready. Life skills play a great part in these people having the ability to concentrate and do their thing.

Seventy per cent of our people are not beyond the grade 9 level and 40 per cent not beyond the grade 6 level, and when you have people come into the institution, as an example, who do not get up in the morning and do not brush their teeth, have not been to the dentist for 15 years, do not shower regularly and so on, before they fill out a job application you have to give them a life skills program. It is similar with drugs. If you get a quote, middle-class woman who may have alcohol and valium and has been convicted, it is very difficult to get that person into a program because quote, she is a criminal.

We see in the Ministry of Correctional Services a range of community programs that will get people literacy-ready for the skills development of the world and for the employment factor rather than dropping them in to get grade 11 physics. We do not have a lot of people who are going to high school to get grade 11 physics. We have people who have basic mathematics and learning to fill out an application and learning to read a bill of lading that says, "Brown shoes, size nine and a half, and put it on the truck."

Mr McGuinty: I think you are doing a heroic job and making a heroic effort. You are dealing with a disposition towards learning which has been compounded with the habits of a lifetime

and is very difficult to break through. I have not the slightest doubt that a cost-benefit analysis would illustrate the effect for good that you wield upon those that you are able to influence.

I have a particular interest because I had a gentleman come to my office last week and I referred him to your office, Mr McDonald, through Mr Patten. He is a retired teacher, actually one of my old students, and he retired with his luxurious Ontario Secondary School Teachers' Federation pension. Instead of going to Florida to sip Martinis and sit on the beach and die at 58, he decided to do something of value and he got together a group of other teachers. He wanted to set up a volunteer group to go in. He is going to start with our regional detention centre in Ottawa and do this on a purely volunteer basis and organize with other volunteers in other parts where we have our institutions, and that is a wonderful tradition.

I honestly was not aware of the structure that you have currently operative within the institutions and I am delighted that you are doing some good work in that area. It is so important.

Mr McDonald: We have 5,000 volunteers directly associated with the ministry's program—these are not transfer payment agencies; it is directly with our program—and they are retired teachers, ministers, members of religious denominations, retired nurses, schoolteachers in their 40s.

What we are trying to accomplish is rather than keep building new, stand-alone prisons, as the United States is doing—they are building \$15 billion worth of prisons and they are just filling them up; they got away from community corrections 10 or 12 years ago—we believe that by spending \$25 million or \$30 million over a period of five to seven years in community alternatives, you can save perhaps \$350 million in bricks and mortar.

I am convinced that if you have community alternatives, you can really enlist the co-operation of the bishops of Ontario, the local service clubs, the retired teachers, etc., who are interested in doing something in the community, to spend that 10 hours a month that will allow a young man or woman to read and to get a job and not to be back with us. By and large, there is a great percentage of those people who are there only because of their social deficiencies, rather than the criminal element of a shotgun at a Becker store. It is not the same.

Mr McGuinty: Has the idea ever arisen of farming out our present activities to commercial enterprises?

Mr McDonald: No, I would be opposed to that. I think that there are enough experiments to know that the social net—and I think that we are the last part of that net—

Mr McGuinty: Has it not been found effective in some states?

Mr McDonald: Well, in some states they have, but in looking at the prison system in Ontario and Canada and some of the prisons that I have seen in the United States, not to say derogatory things about our neighbours to the south, I am just glad I live in Canada.

Mr McGuinty: Thank you very much.

The Chair: Mr McClelland, do you have some questions?

Mr McClelland: Yes. I thank the deputy for being here today. One of the things that you mentioned there caught some interest; I had the opportunity to be at the Ontario Correctional Institute this last week and talked to a number of inmates who were being released, some of them today as a matter of fact, and looking to the prospect of moving into group home programs and community support programs as they sought to integrate back into their community.

You made mention of group homes and alternative processes or programs. I am very much, certainly not expert, but aware of them on the flow-out, if you will, inmates who have served their time and are then, in terms of transition, back into society or plugged into the community programs. I gathered from what you are saying that you would see some beneficial use and indeed a need for that type of program, if you will, on the intake side, as an alternative.

Mr McDonald: I think on both sides you need—

Mr McClelland: Yes. Do we have that, and to what extent, if any? I was not sure. I am not aware of any on the intake side specifically and I wonder if you could help me with that.

Mr McDonald: Basically there are not many, but they are the same programs. On the exit side we have 35 community resource centres for adults, which have 500 beds. We have 52 open custody residences for young offenders, which is about 574 beds. We have 123 probation offices, with 660 probation officers all over, from Moosonee to Windsor. We have alcohol and drug programs, we have literacy programs, we have shoplifting programs.

Those programs are the same for the people who exit as for the ones we want to stop from going into the system, because the shoplifter coming into the system is the same way after the

90 days or 60 days. We believe that by expanding the community programs, they will serve either. They will serve the offender who has exited early from the institution on parole or temporary absence; they will serve as temporary day absence where they stay at night when they can go to a school or a literacy program.

It is the same person who, instead of going to the court, if the crown makes a decision on a diversion program—if we had it, that person could be diverted to the probation office and take the shoplifting program and fulfil the list of mandated programs of community service, helping cut the lawn at an institution, painting a church and so on. So they are really serving a sanction and the restitution to the society at the same time they are in the community taking advantage of a program that is not prison-based.

Mr McClelland: So clearly, in your view, that would be an ideal resource to use in the development of a comprehensive experimental program.

Mr McGuinty: Could I have a point of clarification, Mr Chairman?

The Chair: Mr McGuinty, do you have a point of order?

Mr McGuinty: Clarification.

The Chair: Point of clarification. Did you want to speak to something?

Mr McGuinty: I am amazed that we have shoplifting programs, really.

Mr McDonald: The problem in the criminal justice system, corrections is the end of the line. When I was Deputy Minister of Social Services, I was before all your committees because it is day care and it is mentally retarded and it is a whole range of programs.

Mr McGuinty: It reminds me of *Oliver Twist*.

Mr McDonald: So the problem is in the criminal justice system and corrections. It is kind of the end of the line. It is not a subject that a lot of people spend a lot of time on.

Mr McGuinty: I think you misunderstand. What is a shoplifting program?

Mr McDonald: It is not learning to lift goods.

Mr McGuinty: Oh.

Mr McDonald: It is learning to not lift goods.

Mr McGuinty: I am relieved. Oh, learning not to lift them.

Mr McClelland: Why? Are you interested in applying, Mr McGuinty?

The Chair: Mr McClelland, we interrupted your train of questioning, but please proceed.

Mr McGuinty: It was derailed.

Mr McClelland: Nobody was on board anyway.

Mr McGuinty: True.

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Mr McClelland: I am glad that we have some good humour here today.

Now, deputy, I guess my point just being that the expansion of the facility would certainly be part and parcel on a parallel need, in your view, to develop implementation of ADR mechanisms in the province of Ontario. The expansion of community-based resources is really a necessary ingredient or else it is really not feasible. That is what I hear you saying. It is certainly a necessary ingredient to good ADR.

Mr MacDonald: I think that, generally speaking, as a philosophy, community alternatives for everyone is preferable to incarceration, unless there is the real danger to society. I believe that the elderly should be kept in their homes as long as possible. I believe that the mentally retarded should be in homes in the community rather than at Rideau or Orillia or the like. I believe that schizophrenics who are on medication who have a place to go to get their meds changed every Thursday and be monitored are more preferable than being in my place or in the Queen Street hospital, and we get all these types in our system. We get a whole range of people.

So in 17 geographic areas in Ontario, mostly based on urban population in the Windsors and the Londons and the greater metropolitan areas, we believe that an infrastructure should be in place to have a range of programs that could deal with people in the community who are not a risk to society while they are serving their sanction in the community, in restitution or community service orders, but at the same time dealing with their basic and fundamental problems, ie, illiteracy, shoplifting, family violence, this, that, drugs, alcoholism. Because there are about seven major areas that a great percentage of our people fall into. Alcohol, drugs, family violence, assaultive behaviour, illiteracy and the like.

Mr McClelland: The last question, if I might, it seems to me that one of the valuable components and ingredients of ADR is working with many of the models we have heard about and discussed. It is that sense of being involved in the community and the support group, the family, the friends, other agencies in the community. Again, I draw on my limited experience, if I can return back to my experience of last week of visiting the institution in

Brampton. I talked to a number of the inmates who were literally from all over the province. Indeed, some of them were from out of province. I see that as a problem, if you will, I do not know how serious a problem, in the mix of ingredients, inasmuch as I talked to an individual from Ottawa who is serving his time in Brampton and an individual from Windsor who is serving his time in Brampton.

To the extent that a person was diverted from incarceration—I guess what I am getting at is, why are they removed so much geographically from what I see as a benefit to be involved in their own community where and when possible? Secondly, what do we need to do to get, if I can, that other group of people on the intake side, those who may be diverted from incarceration? Is there a significant lack of services province-wide? Are we again just in specified regions across the province?

Mr MacDonald: Not really. With the 52 institutions that we have, there are basically three types. There are 32, what we call, medium or small jails all across the province, which hold remand population. Prior to being convicted, the judge or the courts will not allow them to leave. They cannot get bail, and we hold them. They are very short-term inmates. We have 10 very large detention centres like the 600-bed at Metro West and the 400-bed at Metro East where, by and large, they are also a remand population held prior to the adjudication of their trial. Then we have 10 correction centres, and we have four youth centres and five treatment centres. In the 10 correction centres, we have one maximum-security prison in Ontario, which is at Millbrook outside Peterborough. This is a 260-bed prison for two years less a day, very problematic people, former federal offenders, and that is the only place we have. We have two medium-security prisons, at Guelph and Maplehurst at Milton. All the people from the whole province go there because they are medium security. Then we have medium to minimum security in Thunder Bay, Montith, Rideau near Smith Falls, Birch near Brantford.

In the treatment area, we have three generic treatment centres, one being OCI at Brampton. That is mostly sex offenders, double addicts or arsonists, by and large. Guelph, 84 beds, is assaultive behaviour people, and at Rideau, 26 beds, they are baddies.

Then we have three regional centres, 84 beds at Guelph, 96 beds that we are sharing with the federal government in Sault Ste Marie that will be completed this spring, and we intend to put an

84-bed add-on to a facility in western Ontario. Those three regional centres are for middle-of-the-road treatment people, the people who live closer to their community who have an alcohol problem or a drug problem but not a double-addiction problem where they have been snorting cocaine and there is hole in their nose. That is a very different kind of problem.

So we are beginning to develop the regional capability but we think, over and above that, the 17 places in the community can have a range of some of those programs that will be able to interact with people who get probation or get exited from the institution earlier from normal. So we have both.

Mr McClelland: Thank you.

The Chair: Mr Curling, you have some questions.

Mr Curling: Deputy, I hope you will see with me and be patient with me as I pursue this a bit. One, I think that the standing committees are an excellent place to have the deputies or the public come and voice their concerns. That is only half way. I hope that the governments and all that will take it up and do some action on that. Then, therefore, this carries me to a concern or to something that you have stated here, which we all know.

We all know you quoted figures of 70 per cent to 80 per cent that are either functionally illiterate or illiterate inside the prisons. Since your population of illiterates and functionally illiterates are so high, what type of budget do you have there to deal with that problem?

Mr McDonald: Our overall budget is about \$500 million per year, but a great percentage of that is in security and in a range of programs. I cannot tell you right off the top of my head the total dollars that go directly into education or treatment, but it is significant, and I could get it for the committee. I would not want to quote a figure that was not correct. We also have budget items that school boards pay, and the Ministry of Education shares in those dollars.

What we find, though, is that in the 10 correction centres we have a rather large category of teachers, social workers, psychologists and a range of volunteers who come into those places every week, the latter do, who really cull off the high-graders, I call them. When you have 100 people at an institution who are reading at the grade-6 level, there are about 20 per cent who really want to read. The 80 per cent, for a whole range areas, need a lot of life skills, training, a whole range of things. They are just not ready to sit down and do their thing.

So our problem is not just getting someone to teach them to read. It is a problem of motivating the people to read. We think that motivation is better in the community than in the institution because, by and large, 85 per cent of the people who are serving sanctions are on probation in the community.

So if we have, on any given day, 7,500 in an institution in remand or custody, we have 45,000 in the community who can go to skills, who can go to school, but they have to be led there in the right vein. So corrections would have a literacy-ready program for those grade sixers. They would then move on to the next program, maybe, that Education has in that community and then they would move on to more of an employment ending.

There is no magic formula to it. I think that if we had all of the teachers that we wanted at Guelph, we would not teach the 100 people to read because they would not be ready at the moment. We think they are more conducive to being ready when they are living in the community and they can go on Wednesday night and Saturday morning to a program. We think it would be better for the court to mandate or suggest that community action and not put the fellow in for six months.

1540

Mr Curling: Well, deputy, the response is precisely the problem, on the way that people perceive that literacy should be taught. There are a tremendous amount of do-gooders who like to walk in there and say, "I am going to teach you to read in three weeks and I am going to teach them in six months."

Mr McDonald: But they cannot do that; it is impossible.

Mr Curling: The whole point about it, though, is that it is not basically a matter of reading; it is a matter of what type of skills and what type of approach one uses for literacy. It could be in health; it could be in all different manners. I am extremely concerned. It would be good to get the figure to see that the ministry—

Mr McDonald: We will get it for you; I just do not have it.

The Chair: I wonder if either the presenter or the questioner can make a connection between the illiteracy issue and ADR for the benefit of the chair.

Mr McDonald: Which?

The Chair: ADR, the topic of our—

Mr Curling: If you are going to make a connection there—alternative dispute resolution,

ADR, is that what you are talking about? That is a challenge for me. You see, the literacy question was raised here and I just wanted to follow through what is an important thing about this. When you go then to a part where maybe there is a connection. As I say, I wanted a question here. I have one quick comment and I cannot let it pass. I heard you mention the comparison with the United States. I hope you will learned from history that the British were in Jamaica for 300 years and they built more prisons than schools. So I hope that they can learn from that kind of history itself.

You mention about the grievance procedures and maybe that has some sort of connection with alternative dispute resolution. I know some of the examples you have used here, deputy, about frivolous grievances. Normally frivolous grievances come when people are unhappy in their environment, and they will complain about everything they can find, so the costs maybe to get legal support or legal assistance then drives the management and the costs extremely high.

There are quite a few people within that system who feel—I think that you are doing an excellent job and you are quite accessible, but I think within your lower ranks, the wardens or whoever the supervisors are, are having problems with their workers there and secondments, for instance. They have always complained that some people who are there a shorter time do get secondments over others, and then those who are privileged and get quick secondment move on to higher promotion. Do you find that is a problem or do you get that at all?

Mr McDonald: I really believe we get some of it. With 7,800 employees and 4,500 to 5,000 working in the institutions in an environment that is tense from time to time, you are bound to have people who are upset. You also have people who work in our system who are not really conducive to the system, but have got a job and are a bit aggravated with their lot in life. But at \$39,000 a year for a corrections officer and indexed pension and the like, it is not a bad place to work from the standpoint of 52 institutions from Owen Sound to Fort Frances to Ottawa; maybe the Don jail is a bit tougher.

Mr Curling: But sometimes money is not everything.

Mr McDonald: I do not mean to say that money is everything; it is one of the items. We follow the collective bargaining process very scrupulously on promotions and competition and where people should be able to compete from within a 40-kilometre area, etc. By and large, we

follow that process which sometimes gets us into trouble in that we cannot move a corrections officer who happens to work at Guelph and has an ageing mother who lives in Smiths Falls, because we have to have a competition in Smiths Falls, the 40-kilometre area, and so on, and he grieves. Well, we cannot do anything about the grievance because it is part of the collective bargaining process and we take this grievance all the way to the Grievance Settlement Board.

There are some people also who feel they should be promoted and that is a matter, I guess, that is subjective. We have 52 superintendents and 500 management personnel, being shift supervisors and deputy superintendents, all by and large—maybe seven per cent have not been there by competition, but all the rest are there by competition. So if we have a specific problem that we see or somebody brings to our attention, we really check it out because we do not need any headaches. We do not need people feeling that they are at the bottom of the pile and can never get out, but they have to be judged against their peers in a competition.

Mr Curling: I have just one other quick thing. The auditor's report reflected that the grievance procedure is about 20 years old. While you talk about the procedure, is there any justice that can be done if you have a system that is out of step with reality?

Mr McDonald: I really cannot comment based on changing of the law, save and except to say that if you do not deal with people one on one on the floor and try to cure their problems if they are upset about their family environment, if they are late, if they have money problems, if they have to pay their mortgage, and so on, if you do not deal with people kind of one on one, the frustration builds. In our system it builds faster because, by and large, of the jail system. There are 75,000 people who come through our gates each year, 75,000 go to court and 75,000 people come back, and then the rest go to correction centres, so it is a volatile, problematic kind of business.

I think personally that in the grievance process there has to be some relationship to cost, that one should not be able to have a grievance that goes all the way through the board and the union has to pay \$2,000 for a lawyer and we have to pay \$2,000 for a lawyer, when we have precedents that we have won these grievances four times before or five times before. How you put some backbone into that system is a problem. We have tried to relate some of the suggestions here, not to take away individual rights and not to take away

the right of someone to seek the right thing, but a better way in which to deal with it.

The Chair: I have several questions. I am looking at your conclusions in your brief. I will read some extracts from them. "The Ministry of Correctional Services supports the development of alternative dispute resolution mechanisms." You go on to say, "The adoption of ADRs in the criminal justice system would have a number of benefits for the ministry and the system as a whole." You go on further to say, "The ministry also believes that the development of new methods for resolving employee grievances would be beneficial," and further on you indicate, "The ministry supports government initiatives that attempt to resolve disputes through negotiation and mediation rather than through costly court proceedings." There are some very supportive statements there in terms of the issue of alternative dispute resolution.

Just to sort of set the scene as to what has been going on with this committee over the last two weeks or two and a half weeks, we have also read from the Macaulay report, which dealt with agencies, boards and commissions, some strong recommendations on alternative dispute resolution. We have looked at your ministry in some detail, which you have gone through in terms of correctional services. We have looked at family law, and had a number of expert witnesses supporting some initiatives in this area.

The Indian Commission of Ontario is basically a forum for alternative dispute resolution within the provincial government. From the private sector we have heard about private courts and private judging. We have heard from the Arbitrators' Institute of Canada (Ontario) about some legislation they would like to see changed, and education and qualifications for arbitrators. We have heard about educational initiatives in the area of ADR.

What I would like to do is call on some of the benefit of your experience, particularly as a deputy minister. How do we as a committee come to grips with the phenomenon itself in terms of recommending some glue or structure to put some framework on this dynamic that is there now? What advice do we give to the Attorney General? What is the mechanism in government to try to take this particular phenomenon, which seems to be supported in a number of individual areas, and make some sense out of it?

1550

Mr McDonald: One has to be very careful, looking at history. A Speaker of the House of Commons gave advice on the pipeline debate and

got himself into trouble. I do not think you should make a big thing out of it. Some people want to bring all these boards together in one room or one building and have exchange of services. I look at the parole board, which works rather effectively in, I think, a cost-effective manner. I think sometimes larger costs you more than keeping some of these issues in a separate fashion. Corporate holding companies have been successful because they have had six subsidiaries. They have not put everything—all their eggs—in one holding company, so you are able to differentiate between programs and problems in the way to deal with things.

I think the civil courts are a good place to start with alternatives. There must be ways in the civil court, when two businessmen fight with each other, so they do not have to go to the Supreme Court of Ontario. There are methods by which they can be resolved. I think the grievance process could be dealt with as a grievance process.

When you get into this whole other range of the criminal law, you have so many protagonists in the system—the defence bar, the crown, the Attorney General's lawyers, the Attorney General, the victims' rights people, a whole range of other people—that it almost makes it impossible for a committee to write a report advising the Attorney General on all those subjects.

My feeling is that the committee should pick the three, four or five subjects that it has hold of and make some considered recommendations on those—I have not had the benefit of reading or hearing how much you have heard—rather than trying to be all things to all people. There is nothing worse than 29 recommendations that are delivered to seven ministries, the and seven ministry bureaucrats look at the 29 recommendations and make a list and it kind of goes on. The process becomes the thing rather than recommendations as to some specific things that you see the system could accomplish or be changed that are reasonable and a way to go.

The Chair: Perhaps I can ask the question a little differently, not that I am not happy with the first answer, but it sort of put a different slant on it. It might be a difficult question for you to answer because of the position you hold as a deputy minister, but if you can speak maybe more generically and more generally, what would you say are the impediments to ministries adopting alternative dispute resolution techniques?

For example, if we take a sentence in your conclusion, "The adoption of ADRs in the

criminal justice system would have a number of benefits for the ministry and the system as a whole." That implies that it does not exist now, or at least to the extent that you would recommend. What would it take for a ministry to get a more receptive response from either Management Board of Cabinet or the Attorney General or the system as it presently responds?

Mr McDonald: Maybe I will not answer it right. Criminal law is federal law; it is not provincial. The province administers federal law, so every time you get into the criminal justice system, the criminal law, you are dealing with the federal government based on its ability to write laws, by its lawyers and legislators, etc., and the province administers it.

The environment of offloading of cost is not conducive at the moment to a lot of changes because it seems like a downward push, federal government to province and the like. I think it has to be sold on the cost advantage along with the protection of the public if you are to sell diversion or alternatives. I made the point with the Young Offenders Act that the judge should be able to say, "I commit you to custody," rather than to secure or open. The committing to custody, with the appropriate changes in the law, will allow the correctional jurisdiction to take the young person, assess the person, move the person then to open custody, probation and out, rather than put the young person into a secure environment and then go back to court and then go back to the secure environment. It just causes delays. I kind of believe that there is not an easy solution to this, but in the criminal justice system it is federal law; it is not provincial law.

The Chair: If we can look at, let's say, the correctional system, I was very pleased to attend a briefing session by your ministry several months ago. I am not sure I can recall the percentage that was used at that particular meeting, but there was a very high percentage, something like 80 per cent or 85 per cent—

Mr McDonald: It is 87 per cent of the community on any given date.

The Chair: No, the percentage that I was addressing is the percentage that are incarcerated for nonpayment of fines.

Mr McDonald: Oh, it is about 16.2 per cent.

The Chair: Is there an area of ADR there? As I understand it, there is a population problem with some of our institutions. Would alternative dispute resolution be a useful method for your ministry, for example, to keep people out of the institutions simply on the basis of—

Mr McDonald: The short answer is yes. I think you have to be very careful that you do not widen the net—I have stated that in there—by making it so simple that you have more people in the net. There are native persons in the Kenora Jail that are there for fines. They do not have the dollars to pay for the fines and their offences are rather minor. There is a range of youths who are in conflict with the law with fines, who are not quote, criminal but who cannot pay the fines. It does not make sense. So the fine option is one of our programs that we have. It is a basis for this.

But there are whole range of other offences that go to court where really people do not need to be in jail and there could be a range of options. Those options are the same options that we need for after care for people who come out of institutions who go on probation. They are the same programs. It is a matter of how you deal with them and when. When you have 4.1 million days plus sentences per year, we have a capacity for 2.6 million and the rest is parole, remission, temporary absence, there is a balance that you have to keep and the more programs you do in the community alternative to incarceration or getting them out earlier the better it is for our system.

The Chair: But on that very point and following your comment, there seems to be a large number of public people holding office, etc., who feel very strongly that conflict should be resolved through mediation, through ADR techniques. The issue is, is there a role for the provincial government to play in terms of setting some policy guidelines for that particular dynamic?

Mr McDonald: Yes, there is.

The Chair: As a committee we are struggling with that whole issue of what form that policy should take. For example, we were fortunate to have as a witness, last Friday I believe, the new Ontario Ombudsman Roberta Jamieson, and she suggested that perhaps the Office of the Ombudsman could have some role in monitoring the extent that government policy is adhering to ADR.

Mr McDonald: I would be absolutely opposed to that.

The Chair: But is there any positive recommendation to the Attorney General or to this committee that you could make to come to grips with that widespread phenomenon that is out there?

Mr McDonald: I would think that civil litigation should be looked at. I would think that pilot or specific test programs on adult diversion

should be looked at in totally monitored situations, so that one can prove, for the protection of the public, for the cost-effectiveness, for the parameters of how you help people, they could be done, rather than put it overall in Ontario, so that you incrementally move towards some type of diversion rather than totally mandate it. There are a range of programs that the ministry already has in position and by the expansion of those programs, rather than incarceration and the growth of our system, they could be monitored.

1600

In the arbitration area, arbitrators will tell you one thing and, if you get it, the union will you another thing, and one goes down the line. There has to be a deterrent in the grievance system. Whether it is a deterrent on management or on the individual not to do frivolous grievances, there has to be some method of deterring or adjudicating prior to going to the Grievance Settlement Board that this is a legitimate grievance that should be heard, not unlike a leave to appeal before the courts.

The Chair: I have one final question. I believe Mr McGuinty has some questions afterwards.

Do you think it would be advisable for the government of Ontario to state a very general, broad policy such as, for example, a Management Board order or directive or policy statement from the Attorney General's office, saying that alternative dispute resolution techniques are desirable and that government ministries should examine ways to implement and promote the use of them as government policy?

Mr McDonald: It is hard to answer that question because I think there are sufficient ADRs out there now that are mandated by the government. I think that unless you look at the resolution of the whole court system, as Zuber talked about it, which is the Attorney General's prerogative—and I would not deem to speak in any way on behalf of the Attorney General's department or the Attorney General—that is the area that Zuber talked about and the area the United States has struggled with for 20 years. That is a big area that really needs a lot of thought.

As far as the grievance process is concerned, I would just like some people to sit down and discuss how to make it better, not to eliminate it, because if someone does not have the right to strike in that environment, he must have the ability to vent whatever his problems are.

Mr McGuinty: I am interested in the fine option. My son was defending a character in

Renfrew a couple of weeks ago whose name is Seamus O'Reilly. He was up in a small town in the Ottawa Valley. He was up for three charges of disorderly conduct. The judge heard the case and, notwithstanding my son's obviously brilliant defence, said, "O'Reilly, it's \$50 a charge or 10 days," and the defendant said, "If it's all the same to Your Honour, I'll take the \$150." He did not have the option, of course.

I can recall having served time on several occasions, as a matter of principle, for refusing to pay fines and I did not have the option of doing anything else. I wish I had had the option. Here is the general question. We hear a great deal—in fact it is not unrelated to our recent dispute with our protective staff—about the overcrowding of our facilities, the horrendous costs of operating them, the backlog and the need for more facilities. I think of it as related to President Bush's attitude on alleviating the drug problem. With the great emphasis on enforcement, he is putting a Band-Aid on a cancer of the liver, a last-resort type of futile effort to control something. Are we winning? What is your prognosis?

You are obviously very sympathetic and very involved. You have spoken about it in a very obviously heartfelt way. Are we winning here? Do you think we will be successful in devising alternatives? It seems to me, in many cases I have heard of, utter lunacy to confine some of these young people in an atmosphere that provides little more than a training school to develop the very skills for which they are being confined.

I am glad to know I misinterpreted your reference to the course in shoplifting, but the fact is that these kids get in there—and I have known them. Having been a slum-dwelling brat, I still have acquaintances, whom I meet from time to time, who over the last 40 years have been on this treadmill, you know, minor confinements, time after time after time. Are we winning? What is your prognosis? Are you optimistic?

Mr McDonald: I am not sure how I could answer the question, only to say that I think we have a better system than the United States in Canada, but we do not have the problems of the United States in their inner-city slums and the like.

Mr McGuinty: No, but in the land of the blind, the one-eyed man is king.

Mr McDonald: I am not sure what that means. I think that by and large we can win or break even in this system if we look at corporate

plan long-term. If we go from incarceration to incarceration or we go from court case to court case and if we do not plan out, if instead of building 3,400 beds in Ontario by the turn of the century, we build only 1,400 and we replace the 1,700 beds that we would have built by community alternatives with 17 places in the community, we will not have won. We will have gone the path of the United States, even though slowly, in not doing those community alternatives.

When probation came in, incarceration went down. When our community alternative programs came in a few years ago, incarceration went down. With any kind of alternative measures, the incarceration will go down. If you do too many alternative measures, you will widen the net. I do not know what that means in the long term. That is the only careful thought that I would give, not to widen the net.

I think the drugs are the damnation of us all. Having been four years AS Deputy Minister of Community and Social Services, from 1981 until 1985, and knowing the streets and knowing what it means to have 2,000 prostitutes in downtown, 500 under 16, and how many are on dope versus the ones that are on dope now—since crack hit the streets two years ago, it is phenomenal. There are 97 police officers arresting drug people, 8,000 arrests a year.

The problem I have is that, by and large, the whole system can be managed, but if the problem of drugs becomes as pervasive as in some parts of the United States, we have got big troubles.

Mr McGuinty: That is the answer, Mr McDonald, that I hoped you would give. You are optimistic. The alternatives to confinement I think are our only hope. To make it better known in the community, this is a problem in which a lot of people have to be involved. It is too big for any one government agency. I am really delighted with your optimism.

The Chair: I do not see any further questions from the committee members. Mr McDonald, Deputy Minister of Correctional Services, thank you very much for coming before the committee and sharing your advice with us. I am sure that your comments and your brief will be helpful to us in our final report to the Legislature. There are no further questions and the committee is adjourned until 10 tomorrow morning.

The committee adjourned, at 1610.

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Standing Committee on Administration of Justice
Alternative Dispute Resolution

Second Session, 34th Parliament
Tuesday 27 February 1990



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Clerk of the House: Claude L. DesRosiers

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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday 27 February 1990

The committee met at 1012 in room 151.

ALTERNATIVE DISPUTE RESOLUTION (continued)

The Chair: This committee is in the third week of a study into the issue of alternative dispute resolution in Ontario.

HOWARD GOLDBLATT

The Chair: Our presenter this morning is Howard Goldblatt, who is a partner in the labour law firm of Sack, Charney, Goldblatt and Mitchell. He has reviewed the use of labour arbitration for the federal government, is an experienced practitioner and has written extensively on dispute resolution in the labour context. Mr Goldblatt, if you would like to make your presentation I am sure we will have some questions afterwards.

Mr Goldblatt: Thank you very much. Let me begin by simply stating that in my appearance here before the committee I must state that I do not appear or purport to appear on behalf of any particular organization or group of organizations. Indeed, I am not sure I can even speak on behalf of my own law firm. I am merely here to provide the committee with some assistance in terms of understanding the way in which dispute resolution operates in the labour law area. It is an area that I practise in almost exclusively and have some extreme, if I may put it that way, familiarity with, because of the fact that I probably appear at arbitration hearings on an average of three days a week.

There are, as I am sure the committee is aware, basically two purposes served by alternative dispute resolution techniques in the labour law area. The first is what we call "interest arbitration," and that stands as a substitute for the right to strike and generally exists as a result of legislation in essential services, but occasionally may be agreed upon between the parties or ordered by some tribunal such as a labour relations board in order to determine the content of a first collective agreement.

The second and by far more frequent use of the alternative dispute resolution technique is during the currency of a collective agreement, as a means of resolving disputes that arise over the interpretation, administration, application and

alleged violation of a collective agreement. This is, I might say, what is mandated by the Labour Relations Act as the dispute resolution technique. This is a concept which is designed to bring stability to the workplace and this technique has been written about and viewed as a *quid pro quo* for a no-strike, no-lockout provision during the currency of a collective agreement. I might just add that it is also the reaction or the result of a positive attempt to keep these disputes out of the courts. It is a way in which there is an attempt to resolve them in a theoretically expeditious manner.

Let me first turn and deal with interest arbitration and provide you just with a general outline of the way it works. It is generally *ad hoc* and generally also tripartite. There are very few situations in which there is a permanent arbitration panel established. Each party normally puts forth its nominee and the two nominees then select a neutral chair. Failing the ability to agree, there is some agency that is charged with the responsibility of appointing a chairperson. Now, for example, in the police and fire sector the Solicitor General will make that appointment and in the health care industry the appointment would be made by the office of arbitration. As I indicated, these interest arbitrations most often arise in situations where the parties are, by law, prohibited from striking because of the nature of the services which they provide. Interestingly, the prelude to arbitration may be a fairly complex conciliation-mediation process, which follows negotiations between the parties such as one finds under the Hospital Labour Disputes Arbitration Act, where the parties try to narrow if they can, or resolve if they can, their differences or simply bargain and then proceed directly to arbitration without any mediation or conciliation attempts. That you will find, for example, in the firefighter area.

The scope of the arbitrator's jurisdiction is generally quite broad. Often they are charged simply with the responsibility of determining the working conditions or the terms and conditions of employment of the parties. This has given rise in the past to some dispute as to how broad that definition might be and has, in candour, resulted in applications to the court for determinations as to whether the arbitrators have gone too far in

awarding particular clauses and collective agreements.

There is, as I indicated to you earlier, no real stability in the way in which it is set up, no permanent system of arbitration, but it would be unfair to suggest that there is not an expertise there. There are many people who have done numbers of arbitrations in particular sectors and who have come to become very familiar with the parties and the issues that are raised and who approach these particular problems with what one might consider a fair degree of knowledge and a very good handle on the particular issues that are before them. It has often been said that the purpose of interest arbitration is to try to replicate the deal that the parties would have made for themselves if they had been able to make a deal. One often has to guess whether, in fact, that result has been reached.

In candour, I would also advise the committee that it may not be expeditious in terms of getting to arbitration, getting a hearing or, in fact, having an award. That depends upon a number of factors that may or not be within the control of the immediate parties. But the success of the system—and I think that largely, certainly in many areas, it is viewed as successful—reflects the sophistication of the parties who have come to use the system over a number of years, who understand what the system is all about and who have skilled presenters and who present before skilled and experienced arbitrators and nominees.

A few statutes should have, and few statutes do have, criteria that the arbitrators are to look at in terms of establishing the terms and conditions of employment, but it would be unfair to suggest that there are not criteria that have been established by practice. For example, police and firefighters often compare themselves within the same regional or general area. I would also advise that the role of the nominees in the interest arbitration area is much more significant than in grievance arbitration. They take a real role and they have a real participation in the resolution process, which takes place behind the closed doors at the end of the hearing.

1020

Occasionally one finds the use of interest arbitration to resolve disputes that arise during the course of a collective agreement. It is not called interest arbitration, but in fact that is what it is. For example, if there is a new job created and the parties want to resolve what the rate of pay is for that job, they will use a form of interest arbitration to do that. You also find a form of

interest arbitration in job evaluation problems in trying to resolve those kinds of relationship issues.

The other area of arbitration and the one that I might spend a little more time on is rights arbitration: the arbitration that arises during the terms of a collective agreement and that seeks to deal with the disputes concerning the application of the agreement. It is fair to say that these disputes are extremely broad. The very common areas deal with such areas as discharge or discipline of employees, such areas as promotion or demotion of employees, and such areas as whether or not the employees have been properly paid or classified. But you find all manner of disputes that come within the rubric of a grievance arbitration, and an arbitrator has to determine whether, in fact, he or she has jurisdiction to deal with the matter. That is the first issue. Arbitrators have jurisdiction to determine whether the matter is arbitrable.

The practice in the past has been to have three-person arbitration boards, again with nominees representing each side and then selecting a neutral chair. More recently, it has become more common to find single arbitrators. For one reason, it is more expeditious to schedule three persons than it is to schedule five people, and there is also a feeling that the nominees do not have as effective a role in a grievance arbitration as they would have in an interest arbitration.

The arbitration process has become increasingly complex over the years. It has become more legalistic. The hearings do appear, at least from my perspective, to take longer to complete. The disputes have become, shall we say, much more sophisticated in nature. But generally, having said all of that, it is still done in relatively informal and, I think more important to the participants, comfortable surroundings.

I can give you an example. Here in Toronto there is a place on Richmond Street where many of the arbitrations are held and the parties feel quite relaxed. They are provided with coffee, they are provided with jelly beans and water and they sit rather than stand. I think the atmosphere is designed to make them feel that they are participants in a quasi-judicial process but yet one in which they can really participate. One has to remember that it is not always lawyers or other professionals who are presenting these cases. They are often presented by laypeople, especially on behalf of the trade unions.

One of the other things that I could add as a matter of atmosphere is that unlike many of the disputes that go to court, we are talking here

about ongoing relationships. These are people who have to deal with each other on a day-to-day basis, often over many, many years. So a dispute that they have today has got to be resolved and they can go on and deal with each other in an appropriate and productive relationship. That is important, I think, in the perspective in which the presenters argue the case and also an important perspective from which these cases are often decided.

I wrote a study in 1974 in which we analysed the delays in proceeding to arbitration. The study was termed Justice Delayed and, at least in part, it led to the appointment of a commission that was headed by then-justice of the Ontario Court of Appeal Mr Justice Kelly, who presented a report and subsequently there was passage of what is presently section 45 of the Labour Relations Act. Section 45 is designed to provide for expedited arbitration. It is designed to break the delay jam, which is caused by proceeding through various stages of a grievance procedure, selecting nominees, selecting chairpeople and having the hearing scheduled.

The way it works is relatively simple. The matter can be referred to arbitration when the grievance procedure has been exhausted or, in a discharge case, 14 days after the discharge; in a nondischarge case, 30 days after the discharge, whichever occurs first. Those are your outside times for the referral.

The hearing must be held within 21 days from the date of the referral. That is the first day of hearing and there is no reference in the statute to any subsequent days of hearing. The chairperson is appointed by the office of arbitration, which has a list for this purpose, and the office of arbitration schedules the hearing place and the parties must appear before the selected chair on the day. There is a training program that is conducted by the office of arbitration in order to have individuals become trained as arbitrators, be put on probation on an arbitration list and, when they satisfy certain criteria, be confirmed on that list for subsequent appointment.

That arbitration training process in the office of arbitration is actually overseen by a tripartite committee, so it does have management and labour representation. As a matter of expedition, I can just advise you that my experience is that it is quite, quite useful in getting the first day of hearing. The difficulty is with the second day of hearing and the third day of hearing. The problem is that the hearings in labour are not scheduled on consecutive days. This does not matter whether it is tripartite or sole arbitrator:

unless you schedule a number of days in advance, you will come before the board of arbitration, you will present whatever portion of your case you can present and then the scramble begins to find other days for hearing. It is not unusual to have some extended delays between the first and second and subsequent days of hearing, simply because of scheduling purposes. One of the challenges that we now face is to try and anticipate in advance the number of days of hearings that will be available.

Let me give you some statistics: According to the office of arbitration, which we consulted, in its fiscal year 1 April 1988 to 31 March 1989 there were 1,712 appointments under this expedited arbitration process, section 45. The office of arbitration also will make appointments in circumstances where the parties are unable to agree on a neutral chair and ask for the office's assistance. In the same fiscal year their statistics indicate that there were 293 appointments under what is section 44 of the act. The Labour Relations Act also requires that you file awards at the completion of a hearing. To be quite candid with you, I am not sure that every arbitrator complies with that requirement, but in any event there were 561 awards filed from section 45 arbitrators and 866 section 44 awards filed in the fiscal year 1988-89.

You will see that there were 1,712 appointments and 561 actual awards: That is, about a third. Many of those were resolved, I would suggest—and this is assuming that everybody complied with the statute—through either discussions at the hearing or through a very useful mechanism that is in place under section 45, and that is a grievance settlement officer. Now as you may be aware, before you go to arbitration there are numbers of stages in the grievance committee where it tries to resolve the dispute. The advantage of grievance discussions is that they are privileged and anything that is said in a grievance discussion cannot be used subsequently at any arbitration hearing, so parties are, at least theoretically, encouraged to be open with one another. The numbers vary from two to three or four stages, depending, and you can get with some cases to a higher stage because of the nature of the case.

But under section 45 there is an additional process built in and that is the grievance settlement officer, who is an employee of the Ministry of Labour, who will be assigned to the case and who will attempt to resolve the dispute, act as a mediator, before it hits arbitration. You can waive the grievance settlement officer if you

feel one would not be of any assistance or you can ask even for a grievance settlement officer in a non-section-45 dispute. The advantage of a grievance settlement officer is that he cannot delay the start of a hearing. The 21-day start of the hearing is statutorily mandated, and so he has to work within a relatively narrow time frame. They have been fairly successful in resolving cases.

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There are some who suggest that their success is not particularly real, that they resolve cases that would have been resolved anyway. I am not prepared to say whether that is a correct view or not a correct view. I think I have found, in my personal practice, that a number of cases have been resolved satisfactorily with the use of this intermediary, the grievance settlement officer.

There are several other places in which arbitration arises in the rights area. Under the Labour Relations Act in the construction sector, differences that arise in the course of a collective agreement are referred directly to the Ontario Labour Relations Board for determination. Again, that is quite expeditious and I think if you were to check the statistics, and unfortunately I do not have them, they likely would show that the number of disputes that are resolved in the construction industry are quite high and the number of hearings that actually take place before the OLRB are relatively few.

Again, I am not certain whether that is due to the nature of the industry or the nature of the disputes, but they would speak very highly of the success rate.

In the Ontario public sector there is a grievance settlement board, which is a government-established board, tripartite, in which hearings are scheduled to be held before and which, quite frankly, takes a long time to get before simply because of the volume of hearings that the individuals are called upon to consider. Other than that, they generally operate the same as in the private sector.

There is as well, I would advise the committee, at least one situation, if not more, for arbitration in nonunionized sectors. The one example is, under the Canada Labour Code, if an employee has been employed for a period in excess of one year, the employee is not unionized, the employee can apply for the appointment of an adjudicator who can basically exercise the same jurisdiction as an arbitrator and can order the individual reinstated in appropriate circumstances.

Labour relations parties have tried all manners of experiments to try to expedite and improve the arbitration process. I think it is fair to say the parties themselves have shown they can be creative and, as well, quite eager to adopt their particular circumstances. One system is the commissioner system, for example, which is in effect.

That system provides that the arbitrator will go up to the work location and will hear a number of disputes in a day; it could be five or 10 disputes. They are heard quickly without evidence being called. They are basically on facts agreed on by the parties. Decisions are issued, if not instantaneously, very shortly thereafter without any reasons being provided. It is a very quick process which has its very strong detractors as well as its very strong proponents.

There are also situations where there are permanent arbitrators who provide parties with certain numbers of days every month or every two months. They are there regularly and attend and allow for any disputes to be brought before them for resolution. There are other circumstances where there are certain arbitration panels that are built in and that one tries to rotate in order to have the matters heard as expeditiously, again, as possible.

One of the problems one has is that while arbitration decisions are intended to be final and binding, there is an appeal mechanism of sorts, which is judicial review by the courts. When I say it is an appeal mechanism of sorts, let me be clear on that. The courts do not sit in actual appeal from labour arbitration decisions, but they do exercise their supervisory authority to sit in what is called judicial review of the inferior tribunals, the arbitration tribunals.

Normally, the first approach to judicial review is in front of the Divisional Court, although in circumstances of expedition you can ask that it be heard by a justice single of the Supreme Court of Ontario. After the Divisional Court hears the matter, it can proceed to the Court of Appeal with leave of the Court of Appeal, and after the Court of Appeal deals with the matter it can be heard by the Supreme Court of Canada, again with leave.

Let me just advise the committee that the courts recognize that they are not anxious to interfere with arbitration decisions. They have said that they will only review and set aside decisions where there has been a denial with the principles of natural justice or errors of law or jurisdiction. The courts recently have been going so far as to say that even if they disagree with a decision, they will not interfere with the decision

unless the arbitrator has given a painfully unreasonable interpretation to the language of the collective agreement.

The findings of fact made by a board of arbitration are accepted by the courts, subject, of course, to any natural justice requirements. The findings of fact are within the exclusive jurisdiction of the board of arbitration. Let me just give you an example of timing for a case to get to the Court of Appeal. I do not suggest this is typical at all because there were several delays all along the process.

I just completed, two weeks ago, an argument in front of the Court of Appeal in respect of an arbitration decision that arose as a result of a management action in July 1982. So the Court of Appeal argument has just been completed, some eight years later. But I would advise it was quite a complicated matter and that there was a period of time of approximately a year between the conclusion of the hearing and the issuance of the decision. That is not a typical delay. We would estimate that a delay from the conclusion of the hearing to the issuance of the award is somewhere in the nature of six to eight weeks. Again, that will depend upon whether in fact the arbitrator is sitting by himself or herself or whether it is a tripartite board.

That contrasts with the court. When one goes to court, one often expects to get the decision almost immediately or shortly thereafter. It is only in the very, very rarest of circumstances that boards of arbitration issue immediate decisions. They always issue written decisions, some of them in varying length, and it does take at least six to eight weeks to get a decision from a board of arbitration.

As far as the precedential value, there is formally no common law of arbitration. The Supreme Court of Canada has indicated there is some question as to whether the doctrine of *res judicata* applies in arbitrations, but there is also no question that a lengthy volume of arbitral precedent does influence other arbitrators. We have, for example, the labour arbitration cases, which are now into their fourth series, which report from all across Canada. It often has been said by arbitrators that collective agreements are negotiated against the shadow of arbitral reasoning, and so parties do consult and consider these decisions of arbitrators in fashioning the language, and indeed, in making their bargaining positions and advancing them during the course of collective agreement negotiations.

The remedial authority of a board of arbitration is quite broad. A board of arbitration does

have the jurisdiction to grant whatever remedy is appropriate in the circumstances. Let me give you an example. In a discharge case, unlike the courts, a board of arbitration can order an employee reinstated to his or her employment with or without back pay, with or without full benefits and subject only to the normal rules of mitigation; that is, an employee cannot be paid twice.

Again as an example, I recently received an award in which an employee has been reinstated and, subject to a suspension, may be eligible for up to three years' back pay less whatever the employee has earned in the interim. There are very few circumstances, but there are some in which an arbitrator makes the determination that reinstatement is not appropriate and where the arbitrator orders that compensation be paid in lieu.

There are many cases in which arbitrators have to fashion the appropriate remedy for the breach and the courts have made it clear that that is within the jurisdiction of the arbitrators to do so. They have said there is no point in there being a determination that there has been a violation of the collective agreement unless you can do something of significance to remedy that breach and assist the parties to proceed. There have been a few cases challenging the jurisdiction of arbitrators in this area but not a lot of them.

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Let me just summarize by indicating to you some of the advantages and some of the disadvantages which we see with respect to arbitration. As I indicated to you earlier, first of all it is something which functions against a background of familiarity. These parties are not strangers to one another and the arbitration process certainly recognizes that and takes quite significant account of that. It is informal. It is relatively inexpensive, subject to what I am about to say.

It is relatively inexpensive but the expenses are not insignificant. Arbitrators' fees vary, and you can find them anywhere from \$1,500 to \$2,500 to \$3,000 a day. That day includes the hearing, the research and the preparation of the decision. So that is not really a day; it is usually quite a bit longer than a day. Those costs are shared by the parties equally. There is no cost factor as in the courts. That is, in the courts, generally speaking, if you are the winner in a case you can expect that your costs will be paid, at least in part, by the other side to the dispute.

In arbitration that does not happen. Each party bears solely his or her own costs of the dispute,

and in addition to the cost there is the cost of a nominee if you have a nominee; there is the cost of counsel if you choose counsel; there is the cost of release time for witnesses and there is the cost of the room in which the hearing is held.

The process may in fact be relatively quick. It is indeed, under section 45, much quicker than most other proceedings. It is final. It is binding. The number of successful judicial review applications is relatively limited, and parties generally recognize that it is a final decision. It is enforceable. Indeed, a question that often arises is, "What if the employer does not want to comply, or what if the union does not want to comply?" The award can be filed in the Supreme Court of Ontario and it is by statute enforceable in the same way as a decision of the Supreme Court of Ontario. So it is enforceable. It does provide an alternative to what would otherwise be a conflict during the course of the collective agreement and, quite frankly, it has provided and has been seen to provide an area in which the parties feel much more comfortable than if they had to go to court. Those are its advantages.

The disadvantage is simply, I think, that it is becoming more complex. I frankly do not view that as a disadvantage. I think I speak more for my clients than I do for myself. It is becoming more legalistic, and I for sure do not view that as a disadvantage coming from my particular profession.

It is a contract. The collective agreements are contracts and they are subject to difficult issues of interpretation and so those difficult areas of interpretation are more often being presented to arbitrators for determination.

There are problems with scheduling, and that is something that has been addressed by the government in section 45. I suggested to you it is not as expeditious as it might be, but it is certainly much more expeditious, should the parties choose to use it, than others.

Ultimately I think that the process depends largely on the quality of the arbitrators and, as I also indicated to you, there is a training program which is designed to ensure that the people are trained, but not just trained, that they are acceptable to the parties. My understanding is that you cannot remain on the list unless you have shown that you have been accepted by the parties a certain number of times over the years; so it is one thing to get on the list, it is another thing to stay on the list, and that is based upon your having demonstrated that you are—put it this way—either acceptable or not unacceptable.

That is just a very general outline of grievance and interest arbitration, and I would be pleased to answer any questions which any member of the committee may have in this area.

Mr Kormos: We seem to be pursuing what I think most of us understand to be primarily an American model of ADR, ignoring the fact that, for instance, in labour relations one form of ADR has been around for a long time and quite frankly, it has probably been developed and become sophisticated during the course of that longevity. I suppose it is most relevant, or could be illustrated most readily, in labour-management relations because my concern has been a few times throughout the course of these hearings that talking about ADR begs the real question, why are we not looking at models of relationships which are less likely to lend themselves to dispute?

My experience, albeit certainly not like yours and not like many others, with labour arbitration, for instance, is that oftentimes the acrimony, the bitterness can be as strong as in any litigation, as in any other forum. I appreciated your observation. You were talking about people who, once it is over and done with, by and large have to live together again. They are not going to go their separate ways.

Is it not important, when we are talking about ADR, to look at it, let's say, in the context of labour-management, maybe some European social democratic models of worker democracy which lend themselves to an elimination of motive for dispute and start to really address the real concerns of ADR?

Mr Goldblatt: I would agree with you in many respects, although I must say that I am not sure whether with the best of intentions we can ever remove the source of conflict. Let me just add this comment.

You are quite correct that these disputes can be as acrimonious as any dispute you are ever going to find anywhere. On the other hand, relationships can exist without the disputes being acrimonious at all. I have several clients who are extremely litigious. They are in arbitration maybe every week with their employer, yet the relationship is quite good because they have recognized that this is where they go to resolve their disputes. I have other clients who are equally litigious and who are in arbitration not quite as frequently with whom the relationship is awful, because this the place where they have to go to resolve their disputes, not where they want to go.

I do not know how to address your question. I think it would be obviously more appropriate if there could be more forms of worker democracy. Unfortunately I am afraid there are always going to be disputes and there is going to have to be some method of resolving it. We have had experience in Ontario over the past 45 years in dispute resolution. It is not a perfect model and it may not be the alternative to some of the European situations, but it seems to be more or less working with us.

The Chair: Mr Goldblatt, I have several questions. It is interesting to note, in your opening, that you had indicated, in the area of labour arbitration, that it had become more complex and longer, that you indicated it was still informal and more of a comfortable setting.

One of the things that has been noted here in this committee by presenters and witnesses over the last two and half weeks is the fact that it is a simpler, more direct way to resolve conflicts. One of the cautions that had been given by a number of the presenters was the fact that you have to be very careful that ADR techniques and so on and so forth do not start getting as complicated and as technical as the court system.

ADR in the labour area has become very refined, very technical and, as you indicated, more complex and longer. What is the danger that the labour arbitration process is basically going to end up being just like going to court? And second, what cautions would you have in other areas of ADR to try to keep it from getting complicated, technical and long in process?

Mr Goldblatt: I think the distinction that I would draw is between complexity and technicality. When I indicated that the disputes were becoming more complex I was referring more to the legal nature of the issues that are being argued. For example, in recent years, due to a couple of court decisions, people are arguing the law of estoppel much more frequently than it was ever argued before, because people did not realize the law of estoppel would apply to labour arbitration. So in order to get a handle on what the law of estoppel is and the various evidence you need in order to argue that case, you might have to adduce evidence you would not otherwise be adducing.

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But the caution I think, and I think one of the advantages of the dispute resolution process in labour arbitration, is that the technicalities of getting the matter before an arbitrator are much less than the technicalities of getting a matter

before the courts. It is in the procedural area that I would certainly say arbitration has its advantage.

There are lots of preliminary objections that are raised, but generally you can go through the various steps of the grievance procedure and you do not normally have to write down your pleadings with any particularity. There is no discovery and there is not a lot of the preliminary process that adds an element of technicality to the court procedures. There are no thick rules of procedure that need to be followed.

The one area in which labour often got, shall we say, caught in is the area of time limits. There were time limits within which you had to move the procedure from one step to the next, and the Legislature dealt with that. The Legislature has now given an arbitrator the jurisdiction to waive time limits or, as it is put in the act, to relieve against time limits except in circumstances where the other side is prejudiced by the delay.

The caution that I would raise is not a caution so much with respect to the complexity of the issues once they arise before the adjudicator, because I do not think that it can be possible to limit the creative instincts of any counsel or representatives who appear in front of adjudicators. The caution I would raise, though, is to make it relatively easy to get there and relatively easy to appear before an agreed-upon, neutral body in as expeditious a fashion as possible. The roadblocks are getting there, I think, and those are the ones that have to be more removed. I do not know if that answers your question.

The Chair: Yes, it does, but it leads me to another question. As a practitioner in the field, living this thing day in and day out, do you have any specific policy recommendations that you would give to the Attorney General for example? We are basically here as a committee looking into this whole area from a broad perspective and also from individual subject areas such as labour, family law, etc. Would you like to see something done differently in the system as it applies to labour law, alternative dispute resolution or generally across the board in ADR?

Mr Goldblatt: I must be quite honest in terms of my practice being so restricted to labour law that I would not purport to be able to comment about how it might be used in other contexts. As far as labour law is concerned, I think that a lot of people have complaints about the way in which the process is operating, and the chief complaint, quite frankly, is with respect to timing, how long it takes to get there and get the matter resolved. The second complaint would be with respect to expense, and the third complaint may be with

respect to the complexity, although everybody likes to hear a nice legal battle and to see people examined and cross-examined.

But I think that generally the system is working fairly well. On a daily basis I deal with complaints and concerns, but also a recognition that this is the way in which things are to be done. I am not suggesting for a moment that there cannot be improvements, but certainly I do not think any major change in this particular system would be appropriate.

The Chair: Okay. How would you describe the quantity and quality of the arbitrators in the labour law field?

Mr Goldblatt: I can suggest to you that there are a large number of arbitrators and I can tell you that the individuals who I appear in front of regularly are extremely skilled and very knowledgeable. There are some who have a legal background and some who do not have a legal background, but I would suggest to you that you would find that they are quite adept at handling the hearings, quite adept at ensuring that parties have the opportunity to present their cases.

Many of them have been around for a long time. I do not appear as often in front of the newer arbitrators, so I cannot—simply because of the nature of my practice most of my work is done with consensual arbitrators, but those who I have appeared in front of recently, I think, suffer only from lack of experience rather than lack of expertise.

As I understand it, the training process requires that these individuals go with experienced arbitrators and write decisions for the experienced arbitrators to review, and I think there are a number, maybe six, in which they can then demonstrate how they handle the matter. There are those who I do not enjoy appearing in front of, but generally speaking, I think that they are quite good at what they do.

I can also suggest to you that the practitioners are excellent. I am not saying it just from my own perspective, but I think you will find, if you look around, that people who present labour arbitrations, as the Attorney General used to do, are generally very skilled counsel because they are doing litigation every day, examining and cross-examining, and many of them then go to court.

The Chair: Are there very special skills that a practitioner would have to acquire to take that extra step and become an arbitrator?

Mr Goldblatt: I do not think so. I think that it is just a question of being able to take off one of your advocacy hats and put on a neutral hat. The

difference in our practice as opposed to some of the other areas of litigation is that in Toronto, and in Ontario certainly, people only practise on one side of the table. We only practise on behalf of trade unions, employee groups and individuals, and there are other firms that only practise on behalf of management.

The only skill you need, aside from being able to manage a hearing, basic management skills, is to be able to ensure that you come across as a neutral individual and that you are in fact neutral in your consideration of the matter. Frankly, I think I could do it. There are others who I am not so sure of in my profession.

The Chair: Two weeks ago Gordon Henderson, past president of the Canadian Bar Association, was a presenter before us, and he suggested the possibility of a legislative framework for the whole area of ADR, particularly arbitrators. He suggested the possibility of the creation in Ontario of a self-governing body similar to the Law Society of Upper Canada or the Ontario College of Physicians and Surgeons to accredit, to provide standards, perhaps to provide certification in the whole area of mediators and arbitrators. Do you think that that suggestion has much merit?

Mr Goldblatt: In the labour area, I am not certain that it is useful. I think the issue depends upon how the chair of the arbitration panel is to be selected. If it is a circumstance in which the individual is appointed, then there has to be some mechanism by which you ensure that the individual is qualified. But if, as in labour arbitration, most of them are by consent, I think that if the individuals do not meet the appropriate standard and do not show that they are able to conduct themselves and reach their determinations in the appropriate fashion, they simply are not used. The marketplace will make that determination.

I think the way in which the office of arbitration now handles it—there is a training program, there are arbitration subsections and there are also academies of arbitrators that sort of police the arbitration profession—it may be appropriate outside, but I am not so certain it is appropriate in the labour area.

Miss Nicholas: I will just get my voice going. I lost it last night somewhere. There are two things I want to explore. In terms of the precedent-setting nature, you discussed that at length, and really you said it was not precedent-setting, but cases are reported and quite often you can rely on those cases. So it is, in effect,

precedent-setting in terms of the law that is being established around the arbitration procedure.

Mr Goldblatt: The courts are reluctant to call it arbitration law, but, yes, there is no question that arbitrators do look to other arbitrators for determining.

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Miss Nicholas: Right, because I remember when I was in law school, we used to read all Paul Weiler's decisions, and then we would be able to base whether anything would happen. I know that outside of the labour law area and other areas perhaps, the government sometimes is unwilling to go to a noncourt system because sometimes it does want something to be precedent-setting.

I am thinking in particular of a case we had before the Ombudsman committee. Farm Q was the name of the case against the Ministry of Agriculture and Food. They wanted to go to court, because if it was going to pay out an enormous sum of money, they wanted to be found at fault in court and have something to tell the Treasurer. "Look, the court found us guilty and therefore we have to pay up this money, so find the money somewhere." How would you see that as—

Mr Goldblatt: Is that the scapegoat theory of arbitration? Is that the idea with the courts? Someone else to blame.

Miss Nicholas: That is right. I just wonder if in that instance mediation has a role perhaps.

Mr Goldblatt: I can be quite honest in saying that there are cases which I am certain that both parties wanted to settle, and this is in arbitration, in which the only reason they have gone to arbitration is because one or the other party definitely wanted to be able to say: "It isn't us who did it. It's a third party who did it." The people who are in the area do not really look at arbitration decisions as being anything other than court decisions. The average individual, the grievors or the unions, look at it in effect as being as binding and as final as courts.

Let me just give you one example in terms of precedent. In the area of contracting out, for example, the "law" has built up over the years to the extent that every arbitrator will now say, "This is what it is and if you want to avoid this result, you are going to have to do something." It is not necessarily precedent in the sense of the common law, but it is a basis upon which parties are expected to understand the content of their agreement and to negotiate their agreement. So it does have that precedential effect.

When people go before arbitrators, arbitrators say, quite frankly, that they are reluctant, especially when the same parties are involved, to interfere with a prior decision unless they can be shown that the prior decision was manifestly wrong. So that is really the precedential effect. It is not true precedent, but it certainly is influential.

Miss Nicholas: But certainly similar circumstances always can result in the same conclusion—very much, maybe not in the same conclusion; I was looking to Carman for the answer. Carman and I went to law school together, sort of, and I always look to him to answer questions I cannot remember.

I recently had a constituent come to me, and without going into the companies and the details because, goodness knows, I never know the facts completely, he was charged criminally and relieved of his duties at work. They have a grievance procedure and there was a criminal charge. I gather the grievance procedure was put aside until the criminal charge was completed. So they went through the traditional court process and at that time he was acquitted or—I always believe in the system of innocent until proven guilty—they could not prove him guilty so he was innocent. But now he will pursue the grievance procedure, which is the one that you have been discussing.

I wonder what grievance procedure would find an individual guilty. I do not want to say "guilty" because it is not a criminal court system, but perhaps find him unable to pursue his duties or his job in the way that he did before the grievance procedure, whereas the criminal court system would acquit this person. I wonder how they go hand in hand, because this is maybe the first time that I have seen both of these occur and I am not sure how that would happen.

Mr Goldblatt: It is not infrequent. One of the differences is that there is a different standard of proof. The criminal proof is beyond a reasonable doubt, as you know. In arbitration, it merely is a balance of probabilities; it is the civil proof. Therefore it may be that there was not sufficient evidence in the criminal process, but it would be sufficient evidence in an arbitration hearing.

The other thing is, and I run into this all the time, it is not unusual for the evidence and the extent of the evidence presented at arbitration to be different than was presented at the criminal process.

Miss Nicholas: Then that leads me to the whole concern I have over a lot of the mediation. I feel that not only justice should be done, but

justice should be seen to be done and I think a lot of people believe in that. Many people will tell you that people got off on a technicality, but we have this basis of the justice system which is very complex, has a lot of technicalities that have been developed over common law, and sometimes we do not necessarily get to the truth but we have been seen to have justice.

I am a bit concerned about a process—and I understand the civil process of balance of probabilities—that would find people guilty, so to speak, or negligent for the same thing that a criminal court system has acquitted them of, and their not having the same protection of the law. So when you go into mediation, maybe you are not being afforded some of those protections that are basic to our natural justice system.

I would just like you to comment on those because it was just something that I had never thought about before and in discussing with the employer, I was somewhat concerned about the fact that he was quite convinced. I do not even know what the man was charged with, as I say, and I know that in this particular industry a theft of \$10 could be monumental. So maybe our court system, for theft under \$200, would take it very lightly, but for this particular business, that was the credibility of the company.

I was somewhat concerned that the employer is probably pursuing it because he is quite convinced that, under the grievance procedure, this person may not be entitled to his or her job back.

Mr Goldblatt: I do not disagree with you. I share your concern. I find it is very difficult, in many of the cases, to try to explain to an individual who immediately says to me: "What about the concept of double jeopardy? I was acquitted, so why do I have to go through this again?" We always have arguments we raise at the hearing. We always explain it is for a different purpose, it is "to determine whether in fact your employment relationship has been made inappropriate."

I can only give you some solace by letting you know that we have had numbers of cases in which the individual has been found guilty in criminal court of the offence and yet has been reinstated at arbitration because the crime was not one which impacted on or affected his or her particular work relationship. So it can work both ways.

The lesson is, and it is perhaps not a very good lesson or a very consoling lesson for an individual employee, that the result of the criminal trial may not be the end of his or her particular personal trial. One has to wait and see.

Miss Nicholas: I am really getting warmed up now. The throat is just rolling along here. I swore to myself I was not going to say anything today and try to get it back tomorrow.

This really concerns me through the grievance procedure that there are these two. It just intrigues me that you go through the criminal system and the grievance procedure and it is not one or the other. If it is, as you say, the same idea that they are concerning themselves with, the theft or the alleged theft, I just wonder if there should be a choice which you pursue, rather than having both.

I think of the employee who may be reinstated with back pay—that may happen—but who has waited for the court procedure and put the grievance aside, and usually the union, I gather, agrees to put one or the other aside first. That process is a lengthy one, as we all know. It may be a year or more before they get to trial. Then the grievance procedure is another one, which agrees on the arbitrator and goes through that process, and it may be a long time before someone gets justice, maybe double or triple the length of what they would normally have, justice to the employer or the employee.

Meanwhile the employer is running up the possibility that he is paying an enormous amount of back salary if indeed the employee is found not guilty in both procedures. It is an enormous strain on the family structure as well. Is there any solution to that?

Mr Goldblatt: I wish there were. I will tell you one of the arguments that we are presenting, which is simply this: Where an employer chooses to rely upon a decision made by the police, if the police are going to charge an individual and the employer is not part of that investigation and charging process, then we are arguing now that the employer is basically stuck with the results of that criminal trial. They have chosen to put themselves in the hands of the criminal process and allowed them to investigate and make a determination. They should be bound by the results of that criminal process.

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Arbitrators are not anxious to embrace that and it is an issue, I think, that needs to be pursued and is being pursued daily. A lot of these cases arise all the time. One of the problems is that the individuals do get off on the basis of what is alleged to be technicality. We do not view it as technicality, it is the protection of law. But the employers view it as technicality and they, in many cases, believe that they are quite justified in pursuing the matter.

Miss Nicholas: I just want to say thank you because this, as I say, just came to my attention two weeks ago. I felt that it was something I had not heard of before and I am not glad to hear it is going on, but that this is the only case that goes on so that I can maybe talk to my constituency more intelligently.

Mr Goldblatt: I am about to meet with an individual who is in that exact position in about 15 minutes.

The Chair: Mr Goldblatt, on behalf of the committee members, I want to thank you for coming and making a presentation today and answering our questions. They will be very useful to us when we prepare our final report, I am sure.

ONTARIO ASSOCIATION FOR FAMILY MEDIATION

The Chair: The next presenter is Jane Kerrigan Brownridge, who is president of the Ontario Association for Family Mediation. She is a lawyer and mediator and I will ask Ms Brownridge if she will please come forward and take a seat at the table.

As you are probably aware, you have up to roughly 45 minutes and you can take as much time as you want in your presentation and leave time for questions afterward.

Ms Kerrigan Brownridge: Thank you very much. I have just handed Mr Arnott some packages that have documents in them to which I will refer, and also my personal view on mediation that I prepared last week for our Peel Law Association newsletter. It was about all I had available on a short notice to provide you. So hopefully it will stimulate some questions and observations.

I thank you very much for the invitation to our association to make a presentation this morning. I will just briefly go through some of the history of the association for your information. Prior that I will just indicate to you what I have handed out to you this morning. First of all is the brief article, entitled "Mediation...An Alternative," and, second, I have handed out the kits. They are contained in the envelopes there and in each of the envelopes you will find two of the most recent newsletters of the Ontario Association for Family Mediation, being the issue 1 for fall of 1989 and issue 2 for December of 1989.

Also therein, you will find a notice of the members' meetings. Our association has members' meetings on a bimonthly basis, and you have the notice there of the 1990 meetings, one of which occurred last week and the next one is

scheduled for 23 April. I certainly would like to take this opportunity to invite any of the members to attend our meeting on 23 April. It certainly might prove to be informative and on an informal basis you would have the opportunity of speaking with many of our members.

Also in the package is our OAFM membership application, about which I will speak more particularly in a little while. And there is the Code of Professional Conduct that has been developed by our association in conjunction with Family Mediation Canada.

Also, there is the family mediation flyer. This is a flyer that is distributed widely by our association and Family Mediation Canada to the courts, to medical offices, to legal offices, boards of education and churches. It is generally distributed to the public so that we can share as much information as possible about mediation.

Additionally, there is a Consumers' Guide to Mediation, which has just recently been published by Family Mediation Canada which is available for purchase. Certainly as you read it you might see therein that it is quite informative to someone who has absolutely no idea about mediation, who might be looking at it as a possible alternative during the time of their separation.

I also have brought with me, which is not in your package, two binders which I will pass around. One of the binders is an introduction to family mediation, a distance education program. This has been put together so that we can reach other members throughout the province, members who are not able to come to our meetings on a bimonthly basis. This certainly sets out many of the requirements of mediators. It certainly sets out some of the training program materials that are available, in Toronto more particularly.

Also, I have the National Directory of Family Mediation Services which is hot off the press. I guess about a month ago we were able to complete this. Family Mediation Canada has published this in conjunction with all of the provinces and the provincial associations.

Also in your kit you will see order forms for the consumers' guide and the distance education program and the national directory. The prices are included.

Would you like a little time to look through the documents or would you like me to continue?

The Vice-Chair: I think you can proceed. I was just looking to see if we had any overwhelming response from any of the members. You can proceed. We will try to pick it up as we go, in reference to the documents.

Ms Kerrigan Brownridge: The Ontario Association for Family Mediation was established in 1982. We currently have 15 board members, including social workers, psychologists and lawyers. We have one judge, an accountant, a minister, a professor, a nurse and a business consultant. The board is truly representative of our interdisciplinary membership which now is approximately 325.

From the inception of the organization, the board has been sensitive to the necessity of the quality of mediation services in the interests of building a solid foundation on high standards and developing our credibility. To this end, the standards and ethics committee developed a conduct code in mediation. That, by the way, was developed in 1984 and this document was the basis for the subsequent development of the Code of Professional Conduct, which is included in your package,

You will note in the OAFM membership application, which you have in your package, on the last page, the association requires members to make a declaration that they will abide by the code of professional conduct.

Also, on our membership application, you will note on page 2 the criteria for practising mediators. This criteria came about by a decision of the OAFM board of directors in 1987 in recognizing the need to establish a minimum set of standards in order to maintain and encourage integrity in the mediation process. Currently, about 40 of the approximately 325 OAFM members have been designated practising mediators. That is to say that 40 of our members have met the required standards and made application to be designated practising mediators.

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In June 1987 the OAFM affiliated with Family Mediation Canada, which currently has a membership in excess of 600. A relationship with Family Mediation Canada has enhanced the work of our organization as well as theirs and it involves the co-operation in many ventures such as production of videos, which are used across the country, publication of brochures and manuals. We also co-chair the annual mediation conferences. For instance, the conference of 1989 was co-chaired by the BC mediation association and in the fall of 1990, the Family Mediation conference will be co-chaired by the Halifax association. In the following year, 1991, the Ontario Association for Family Mediation and Family Mediation Canada will co-chair our conference in Toronto.

That just gives you a brief overview of the history of the Ontario Association for Family Mediation, just to give you an idea of what I guess our basic philosophy is with respect to mediation as a form of alternative dispute resolution. The association and its members certainly believe that mediation in the resolution of family disputes is a less traumatic process, certainly less time-consuming and less costly. We believe it promotes a greater level of comfort, especially for children who are going through the process of their parents' separating and divorcing. For instance, in mediation, a very positive outcome is when a child knows that his mommy and daddy have been able to agree on matters as they affect them without having to be exposed to the constant tension and stress of the litigation process.

With respect to being more efficient and expedient, mediators do vary from person to person in terms of the time they would spend in mediation with parties. However, when one looks at the hours spent in mediation and the hours it may take to get a final resolution in the courts, there is a significant observation of much less time in the mediation process.

For instance, I can just offer my own experience as a mediator, and I have been doing family mediation for approximately five years. I would say on average that a mediation in a situation of custody and access would not exceed seven hours. If I am doing a comprehensive mediation, that would entail perhaps between 10 and 20 hours, depending on the complexity. But certainly you are looking at a time frame that is quite abbreviated in terms of resolving a case in two or three months, whereas the court system of course, with all its adjournments, discoveries, cross-examinations, pretrials, etc., can expand into two to three years for a final resolution in many matters. Of course, the hours involved there add up in dollars quite significantly whereas in mediation, I believe, you would find in a survey that mediators as a whole would offer an hourly rate that is considerably less than the rate that lawyers would charge. However, I will qualify that. There are many lawyer mediators who certainly adhere to their hourly legal rate, but once again the time of the process is much more abbreviated than that in the adversarial system.

I will just touch on an issue that I know is of great concern to many groups, the issue of mediation in areas of domestic violence or family abuse. I would say, with respect to that, that a skilled mediator would screen a situation to the

point of making an appropriate referral where there would be a situation where a couple presented themselves and it was obvious that issues of family violence had not been resolved. If a skilled mediator recognizes that, he certainly refers the parties to an appropriate resource before commencing the mediation process. The mediation process would be undertaken only when the issues of family violence or abuse would have already been dealt with in the appropriate professional forum. I think there has been a great misconception in that area. I stress skilled mediators. That is why our association is seeking to set high standards and why we have set out these criteria for practising mediators.

We are looking towards developing mediation perhaps down the road to a profession in and of itself wherein there are highly skilled persons who would know how to deal with specific matters very appropriately. Certainly in the area of child abuse, I think it would be very, very incumbent upon a mediator to make the appropriate referral and not be involved in mediating a situation that had not been dealt with in the appropriate forum at first hand.

Mediation is a process that we feel is ideal for those parties who are divorcing who would like to do it in a peaceful fashion, who hesitate to start off with lawyers whom many perceive as perhaps aggravating the situation at the initial stage. I am addressing a particular situation. Mediation offers a service to those people who realize their marriages are breaking down and they want to go separate ways. They would really like to work it out themselves but the issues are fairly complicated and they would just like someone to speak with in an informal and neutral fashion to help them work out the details of their separation.

Another misconception that I have become aware of is that mediators actually have the parties sign agreements in front of them or prepare legal agreements that are signed and meant to be binding contracts. That is not the case. In our code of professional conduct, you will see that every mediator must ensure that the parties know they have the right to legal advice and that in fact if a mediator does get to the point of preparing an agreement for them, they must take that agreement to independent lawyers, not to the same lawyer; they must go to their own independent lawyers and seek legal advice on that prepared agreement. No signing is done in the office of the mediator on a contract without independent legal advice having been sought.

In fact, I can tell you that in my practice I never have clients to mediation sign their agreement in

front of me. I send it with them off to their lawyers and say, "If the agreement stands with no amendments, then certainly sign it in front of your lawyers, having had the benefit of the legal advice." Once again, this goes to a quality and standard of mediation. This is the required practice that is promoted by the Ontario Association for Family Mediation and Family Mediation Canada.

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It is our view also that mediation is far superior to courtroom-door settlements. Certainly I understand from the research that approximately between 80 and 90 per cent of matters are resolved without going to trial. However, the way in which they are resolved is sometimes a little rough, to say the least. Certainly in my experience as a lawyer I have seen many situations where at the courtroom door under great duress, under panic of going into a courtroom, of perhaps testifying in front of children and all the other uncomfortable things that are present in the litigation process, a settlement will be meted out and I would say that that is quite worrisome in terms of the way it is done.

In mediation the parties have time to work out their issues. They have time to present. Each party presents the interests that he or she has and what it is each wishes to accomplish. The mediator facilitates each of the parties towards a point of agreement. It may not be the most perfect agreement, the most perfect solution, but it is one which the two of them can walk away feeling that they can live with, that it is okay, that they have worked it through.

The statistics indicate that a mediated agreement certainly is more sound, that the parties who have come to an agreement by themselves and have control of making their own agreement are likely to have an agreement that will be much more solid in comparison to, for instance, the courtroom-door settlement or to a decision of a judge that is imposed that very often designates a winner and a loser. When you are dealing with a situation of custody and access, to have a winner and a loser certainly has many negative connotations, and especially for the children: children who see that their mom lost or their dad lost custody. I think it is a fairly traumatic experience for children to have to go through.

Part of my background has me much more sensitive, possibly, to children in that I have represented children for the official guardian's office for 10 years. Certainly in my mediation I use a focus on children as my entrée into

mediation with the parties. I find that there are few parents who do not have the children's best interests at heart. I think that approaching it by starting with the children often gives them a common ground. They begin to communicate and then you can move in to the larger issues once there has been some movement with respect to the issue of custody and access.

I have just used the word "movement" and I will speak on that for a moment because I believe that in every mediation situation it is not necessary to have a final written agreement to have a success. I think that the process of mediation itself is a series of successes where you can get to a point where people can even communicate and have time to calm down and take hold of their positions and their feelings and just realize that they do have to go on; there is going to be a separation; there will likely be a divorce; life has to go on. How are they best going to get this organized so that they can carry on and have a reasonable quality of life and, of course, provide the same to their children?

So while every mediation situation may not go through to completion, there may be significant gains along the way. Even if the matter goes back to the courts on particular issues, there is already the development of a communication process that may help them in terms of negotiations in the court process.

Family mediation is a different approach. The way of doing family mediation is different from the approach in commercial mediation, and I have the benefit of working in both forums. I have for the past year been doing commercial mediation and I have learned that the process of commercial mediation has as its approach more blocked times of mediation. For instance, you would have a mediation set for four, six or eight hours and really accomplish the process and a result in that period of time, whereas in family mediation the model that seems to be most commonly used is a one- to two-hour session at a time, and then continue a week or two weeks later and so on until the end of the process.

Certainly my practice has changed from five years ago to the way I do things now. In fact, I am currently looking at the possibility of making another change and in the area of family law looking at longer sessions. I found recently in my practice that parties seem to respond to longer time and to not being cut off at a one-hour and a two-hour point, and can make some more progress. I see that as being in the long run a benefit, because perhaps the family mediation time can be cut down even more significantly by

doing, perhaps, one, two, three or four longer block times, more in the fashion of the commercial mediation approach.

Last, I will just make some comments with respect to the Attorney General's Advisory Committee on Mediation in Family Law. Our association has taken a position very much in support of the recommendations made in the committee's report. I would say that probably the most significant part of the recommendation, or one of the more significant parts of the recommendation, is the mandatory public legal education session, not necessarily mandatory mediation but at least making mandatory the availability and the information concerning mediation, making it available to parties at the first instance when they may commence proceedings in the courts.

In the past year in our own association, in fact, we have recognized that public education is just so very important. If people do not know of the services available to them or do not know what their options are, certainly it is difficult for them to avail themselves of them. Our association has developed a speaker's bureau in the last year and our speaker's bureau is targeted at the school boards, at various law associations, medical associations, church groups, public forums, etc. Certainly the association is very supportive of a public legal education session being made available to parties who are commencing legal proceedings to resolve their family disputes.

Additionally, the association supports the recommendation of the pilot project. Currently the services in Ontario are pretty much restricted to private mediation. There certainly is the forum at 311 Jarvis St wherein mediation service is provided, but certainly not on a large enough scale. The pilot project proposed by the Attorney General's committee would appear to be one that would allow the development of the services in an orderly fashion, one that would allow the setting of minimum standards of mediation practice and could build in certain safeguards, for instance the screening of situations wherein there may be domestic violence.

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I think those are all my comments. Certainly, if you have a chance to view the handout entitled "Mediation...An Alternative," it sets out, perhaps a little more specifically, some of my personal views. But I do not believe my personal views are too far afield from the views of our association. I feel very much entrenched in it; I have been involved in this board almost since its inception, working on committees, one way or

the other. So certainly I would invite any questions, comments, whatever.

Miss Nicholas: Our new chairman has added a certain distinguished aura to our committee, may I say.

Mr Curling: Hear, hear.

Mr McGuinty: What does that say about my colleague from Ottawa? That is a nasty insinuation.

Ms Kerrigan Brownridge: I just realized, you are from the Peel area.

The Vice-Chair: Yes.

Miss Nicholas: You should also realize that—if I may indulge even further, I just cannot help it—there are three Windsor law school graduates in this room.

Ms Kerrigan Brownridge: Oh, my gosh. You are quite right.

Miss Nicholas: Unless Susan?

Ms Swift: No. McGill.

Miss Nicholas: Oh. Well, sorry.

Interjections.

Miss Nicholas: Anyway, I have the floor.

Mr McGuinty: I have a disreputable son who went to Windsor as well.

Miss Nicholas: Oh, yes. And he added something to it.

I was impressed by what you said about your law degree, your qualifications. You have a BA, a master's degree in social work and a law degree, so you have a variety of qualifications or experiences that allow you to add a certain something to mediation or the role of a mediator. You spoke about mediation and the training of mediators and that is something I am a bit concerned about. I know that you mentioned that some lawyers are mediators and some other qualified people are mediators. Is there a program that you suggest that would be good province-wide to ensure that the mediators we have are qualified ones?

Ms Kerrigan Brownridge: Yes, certainly this is an area that both the Ontario Association for Family Mediation and Family Mediation Canada are equally concerned about. Right now, there are several training programs in the Toronto area and they are quite well recognized and good programs, and currently we have a committee on our own board comprised of Howard Irving, who presents one of the training programs, and Barbara Landau, who presents another one of the programs.

There is an ad hoc committee that is looking at establishing training programs that have some continuity, have all of the necessary components to allow persons to take the courses and be truly competent. In the training programs, we are certainly promoting the adherence to the standards that we are setting out in our criteria. We are looking for a uniformity in our training programs and that is what has been missing. You will find that the programs that are being presented are not necessarily uniform, and that is what we are looking for. But I think, as you will see in our literature, that we are looking towards establishing higher standards so that the potential profession of mediation will develop in a very credible manner and be of good use to the public.

Miss Nicholas: One of the comparisons you made, and I wonder if it is a fair comparison, is that you compared the length of time that it takes to go through the mediation process and the length of time that the court alternative takes. There is quite a difference in time.

I just wondered if that is a fair comparison, although I do recognize that one is much shorter than the other. The one thing that you do have with mediation is willing parties. You have willing individuals to the process and you have willing lawyers. As much as I hate to dump on my own profession, lawyers sometimes do contribute to the delays that go on, because of their busy schedules and previous engagements. I do believe that people are entitled to the lawyer of their choice, and this perpetuates the delay. That is one of the reasons—I am not saying that is the whole reason—behind the backlog.

Ms Kerrigan Brownridge: I understand what you are saying here.

Miss Nicholas: But one of the things that does happen, or one of the main basics of mediation, is that you have willing parties, parties who are willing to come to the table, lawyers who want to proceed with it, and that makes it proceed faster.

If you had those same willing parties going to court, the time may not be different. I just wonder how much a factor that is in the expedition of the time. It is good to have an alternative so that they do not clog up the court system even more, but I wonder if that is a fair comparison.

Ms Kerrigan Brownridge: I can understand what you are saying. It may not be a totally fair comparison, but I guess what I am saying is that my sense is that many of the persons who become involved in litigation, had they known about mediation, would likely have opted for a process that would allow them to have more participation

and not divest a lot of their own control to their lawyers.

It would seem to me that, as you say, it is often the system itself that protracts litigation. If we could have our hearing dates within a couple of weeks and have all the discoveries done very quickly and have very few adjournments, then perhaps the time that the litigation in family matters takes could be collapsed.

The thing is that in the legal system there are so many factors operating, whereas in the mediation system it is just the parties and one mediator. You are not dealing with, as you say, two lawyers who have cumbersome case loads and schedules, etc, the court, which is quite backlogged, and all sorts of variables that may develop throughout the course of litigation.

I agree with you that it is not totally fair, but I do believe that if more parties were aware of the difference and if they understood it—it is my feeling that a lot of the parties do not have any realistic comprehension of the cost of litigation until they get right into it.

Miss Nicholas: It certainly can be costly, but a lot is involved. Another defence of lawyers is that people do not realize how much time and effort is involved in litigation and in the legal process. A lot of people should consider that: that it is not cheap, but there is a lot involved. It is not something you should take frivolously.

I just had one more question. We had two ladies appear last week, and I am sorry, I do not remember their names.

Ms Kerrigan Brownridge: Carole Curtis and Jennifer Treloar.

Miss Nicholas: Yes. Thank you. That was easy. From the Canadian Bar Association, Ontario division. We in the government have a wide mandate and if I shorten it I may not begin to say exactly what we are here for, but our mandate is to find a policy within the government, or establish some kind of policy, or encourage the government to establish a policy, with respect to mediation in a variety of areas, or where we should be using this as an alternative mechanism.

When I posed the question to them, "What should we be doing? Can you help us with recommendations? How can we help?" the initial answer was, "Well, you can't really. It's been going for 10 years. You should have been around 10 years ago," and, more or less, "Now you're too late." And there was a little bit of suggesting about public funding in areas outside of Toronto. Anyway, I came away feeling that I could not help, from that answer. Maybe I can ask you the

same question. I do not know if you have read the Hansard. Obviously, you knew they were here.

Ms Kerrigan Brownridge: No. I knew they were here, but I—

Miss Nicholas: Is there anything you think we can do to assist, as the government, and in what area? Without mandating, but if there are people who are willing to use this process, how can we help them use this process so they do not clog up our court system?

Ms Kerrigan Brownridge: It was your understanding from their reaction that there has been a development of mediation over the past 10 years and it has got to the state it has got to, and there is nowhere to go. Is that what they were saying?

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Miss Nicholas: They did not say "nowhere to go," but they feel it is moving along and that the parties who want to be part of the process are, and that really there is not anything that we can do.

Ms Kerrigan Brownridge: I think there is lots you can do, because really I see it day after day in the courts. I am a family lawyer as well as a family mediator and believe me, I do represent clients in the adversarial process as well. But what I see day in and day out is the availability of mediation to clients who can pay for it, but not to those clients who are not in significant funds.

And what I see happening is certainly that parties who do not qualify for legal aid are paying their lawyers. They may be paying an assessor, and then to pay a mediator—I do not know how on earth they are ever going to survive when it is all said and done. The money should be going to the children, that is the way I certainly look at it.

Where I believe the provincial government can be of assistance is by helping to make mediation available much more globally in the province. Setting up a community-based mediation service, and I know everyone has a bit of a different idea about it, I certainly can see a situation where the government would be able to set up a pilot project, as has been recommended by the Attorney General's office, controlled to the point of setting the standards of the mediators who would be used and where either the government itself hires staff mediators who certainly would have to meet the minimum standards, or, in the alternative, have a roster of mediators who are private mediators willing, certainly, to mediate on a sliding-scale basis, or whatever would be a cost-effective way of getting the program under way.

I think what you will find is that the majority of the members of the Ontario Association for Family Mediation really want mediation to be promoted, to have the public aware of it and so there is the availability to use the service.

I personally do not think enough has been done in terms of public education around mediation as an alternative. And then, even if there is public education, where are the services to back that up? As I say, there are just very few services that do not require a great expenditure or a fair expenditure of money. So I certainly think the government could help.

I think it is wise to start a pilot project to then see how it develops, so that there can be amendments, changes made as the process develops so that you are ultimately coming up with a service that is truly meeting the needs of the public so that it is money well spent.

It truly is my belief that, if the knowledge of mediation and the service is wider spread, you will find more people availing themselves of it, and hence there is less use of the courts. Certainly I know there are many cases that cannot be mediated; I am well aware of that. The courts do have to be resorted to in many circumstances. So the goal would be just to reduce the number of cases that have to go to court, essentially, by offering this other service that I would be quite confident would be used if it were available.

Mr McGuinty: You have ended on a very pleasant note, Ms Kerrigan Brownridge. I think one of the high notes of these brief presentations was hit by William McMurtry, who was the first one to appear. He struck a very responsive chord with me when he made a number of remarks. First of all, he did not learn a damned thing in law school; second, what he learned about law, he learned from his father; that is, in terms of underlying principles. But he also made, I thought, a very, very fine remark, something to the effect that the mark of a civilized and just society is reflected in the accessibility that ordinary people have to due process. I think that is a beautiful statement and something that sometimes goes by the board.

Again, with your reference to, sometimes, the costs of litigation, you struck a responsive chord. I never taught lawyers law, fortunately, nor am I a lawyer, equally fortunately, but I taught a lot of students who went on to law and I remember some very disreputable characters as well. One of them, incidentally, is just appearing before the master; another one of my students in Ottawa, having billed a couple \$85,000 for five months of litigation in a marriage dispute, another couple,

\$4,500 for three months. That is not a reflection—that is the exception which tests the rule. But your point about litigation sometimes being excessive: People have been very apprehensive and very intimidated by it.

In your booklets that you passed around you have a very fine and definitive statement about the training courses for mediators, and in fact, your own curriculum vitae indicates that you completed courses in mediation training through the University of Toronto. I am curious as to how you train a mediator. I have had some experience dealing with the official guardian and I know that, when dealing on behalf of children and those who are the innocent sufferers of the fallout effects of marital disputes, above all it takes a great deal of sensitivity. There are certain qualities, sympathy, empathy; these are kind of innate, almost inbred. And while you may train people in the techniques of that mediation, I am just wondering to what extents you can really instil the kinds of qualities particularly, I think, when you are dealing with family situations and children are the victims.

In my experience, for the first time I see teachers in the classroom take \$48,000 for eight months' work who do not like kids; I have seen university professors making \$85,000 for whom young people are a pain in the rear because they are distractions from their publish-or-perish, squirrel-in-the-cage routine. In teaching, in nursing, hopefully in medicine, hopefully in law, particularly in law experiences and in mediation there are certain qualities that you must have, I think, and if a person has not got those qualities, I do not give a damn how well versed they are in the techniques. I recall one time being trained by Carl Rogers in the techniques of counselling, and he said, "You must develop a rapport with the student whereby the student feels free to bring forth, you know, and have a kind of catharsis." My question was, "If he has a catharsis, who is going to clean up?" It went over the heads of my colleagues.

What does this training consist of?

Ms Kerrigan Brownridge: You certainly hit a chord with me, I must say. I identify with everything you are saying, and I could ask the same question. How do you train a social worker, for instance?

Mr McGuinty: Yes, exactly.

Ms Kerrigan Brownridge: Having been through the social work training process myself—

Mr McGuinty: If I might interject, that is part of the problem I deal with in my constituency: social workers who do not like people, no matter

how damned well they are trained as a master of social work, who have not got a feeling for people.

Ms Kerrigan Brownridge: I think you are quite right. You can have all of the technical requirements down pat, jump all the hurdles that are necessary, but I think what separate the chaff from the wheat or whatever are certainly the innate characteristics that persons possess that will, and that is hard to qualify, make them better in the particular profession.

For instance, certainly in social work what you will find is that the social workers who are most skilled will certainly be the ones who will be more successful and continue to improve as time goes on. The ones who do not have that innate quality will fall off. I mean, at some point they will just totally burn out and they will not be able to hang in. I think it is similar with respect to mediators, and I think if there is any bone I have to pick with the development of mediation and perhaps other professions is that when a profession is in the neophyte stages and there are no standards, no regulations, anybody can hang their sign up and say they can do it.

Mr McGuinty: That is right. Exactly.

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Ms Kerrigan Brownridge: In my profession as a lawyer I see many of my lawyer colleagues saying: "Gee, that looks pretty easy. I have been in settlement negotiations; I think I will try some mediation." They just do it. That does not sit well with me or many of my mediator colleagues, because certainly there is more to it than just doing it. There is required, I would say, the characteristic to espouse sensitivity, empathy, concern for public welfare. I think that all of those qualities must be inherent in a skilled mediator.

I guess what I can say to you is that we are cognizant of the necessity of developing the mediation practice at a very high level. We want to have the mediators who are dealing with the public and our families to be those special persons who have special skills in the area. It is my belief that, as in other professions such as social work, those who truly are not committed to us will not last very long, and those who are committed will stay in there as a core group, will rise, hopefully, to the top. As time goes on we certainly are looking to mediation as a profession that hopefully will attract the best of the service providers in the area.

In our own association, we have set these criteria for practising mediators, and there are only 40 who meet these requirements of our

membership of 325. We will eventually get to the point of, perhaps down the road, and this may be a couple of years, setting up a discipline committee to take complaints about mediators in the community who really are not meeting even the minimum standards. Hopefully, by doing that we will be able to weed out those who really should not be, you know—

Mr McGuinty: You would be interested—maybe the clerk could supply you with a transcript of this. We had a young lady from Washington working in this area, and they have a very sophisticated program along the lines that you have indicated. They select mediators scrupulously with regard to standards, they try to train them, some of them flunk out of their training, then they go on to the mediation experiences and some of them are then dismissed. They are very well refined, because we are dealing here with the human psyche, and the fallout effects of this might be lasting and harmful. And apart from the humane responsibility, the cost-benefit analysis would show that you are dealing with lives.

Ms Kerrigan Brownridge: I think the ultimate goal of mediation is to provide a service to the community wherein parties who are separating, families that are breaking down, are provided with a mechanism of separating in a humane and peaceful fashion so that they can carry on with their lives and provide for their children in the best way possible so the children certainly are not losing out.

Mr McGuinty: I really appreciate your presentation. It was just delightful.

Mr McClelland: I recognize that time is running beyond short so I will try to be as brief as I possibly can.

When you are involved in a mediation process, do you come to a point where you segregate issues and say that there are some things that we probably cannot deal with, you are going to have to hammer that out in the adversarial process, but let's get off the plate at least those things that we can deal with? Is there often an interim or mid-way point and that happens frequently?

Ms Kerrigan Brownridge: Absolutely. There is no question. I have to say that is a great benefit, I think, of mediation; that often what will come to me are situations that have gone to court for interim relief, such as interim custody, interim support. And the judges in Peel, I can tell you, certainly are very predisposed to referring to mediation. At that very point, they may adjourn the matter for a week or two so the parties can

speak with a mediator and deal with what the interim situation is going to be.

That is often so helpful because the parties are at a state where they are usually distressed. They do not know what direction they are going in. If it has been a sudden situation, a breakdown, they really need a lot of support. Certainly, in an interim stage, a mediator can come in and then back off for a while to certainly see whether he or she is needed. Sometimes the interim stage is just fine and the parties can carry on with the help of their lawyers from there.

Not every court process is necessarily aggressively adversarial. In some cases, parties just really want to go to court to get the judge's stamp of approval on something that they may be quite happy with. It does not obviate the use of the courts, for sure.

Mr McClelland: Conversely, what has your experience been in situations where you may in fact have mediated a settlement, believed that you had it, provided either a summary of the terms of settlement and/or a draft agreement and it breaks down when a party goes to a lawyer and he or she says, "Here are some points that you missed and it is my job to protect your interests."

I am not looking for hard numbers but what is the sort of general experience of that scenario taking place?

Ms Kerrigan Brownridge: That certainly does take place. I would say it definitely is not the majority. It is a small minority of cases. I do not know how representative I am of a mediation practice. I do not know that we have really established how many cases any of us handle in the course of a year. But I would say it is not common, but it does happen.

What will often happen is that a lawyer will call me and say, "I just cannot advise my client to sign this agreement." What I will say is, "Speak to your client and the other lawyer and if the parties want to come back and just deal with this issue, see if we can have any movement, get a little closer, make some adjustments," and that is quite fine.

In fact, I have a matter right now that has just come back to me on that very point where one of the lawyers recommended that the client not sign the agreement because of one particular issue. The parties are coming back to me. We are going to hash it out again. We are going to just look at what the difficulty is.

In other cases, a lawyer will just say: "My client is just fed up with everything and wants to get on with it. We are going to push ahead." Fine, but it is their choice. That is the difference.

Mediation is definitely the choice of the client. I reiterate to them over and over again in the process: "It is your decision. I am helping you make your decision. There is no judgement. There are alternatives." If I do anything, I will set out four or five alternatives that, from an objective point of view, look possible.

Mr McClelland: How would you respond to the criticism or the possible criticism that you may have a situation where two parties come to mediation, arrive at an apparent resolution of the matter and one party retrenches his or her position back to a fairly nonflexible position? The criticism may be put to you that what you have effectively done is hurt the party, to use your own words, who is prepared to move. He or she has now lost some negotiating leverage. They have certainly lost it in terms of their ability to sustain the oft-times difficult and very stressful situation of dealing with that.

1210

I would just be interested in your response because I have heard that is, from time to time, suggested as a criticism of mediation, as much as it can weaken a party who is indeed trying to be conciliatory and, again to use your word, move from their position.

Ms Kerrigan Brownridge: Absolutely, I can understand. What I would say is that the mediation process is meant to be a confidential, nonprejudicial process, nonprejudicial to ongoing litigation if that ends up being the case. That brings about the difference between closed and open mediation.

If it is a situation of closed mediation and this situation arises, the parties would then go to court. But, in fact, the parties to mediation sign an agreement initially—at least this is my process—indicating that they are opting for closed or open mediation. If they are opting for closed, in that agreement they are saying that nothing in the mediation process will be used in a court of law should continued litigation be necessary.

Of course, what we have no control over is the right of counsel for a party to subpoena a witness and they certainly can subpoena a mediator to court. However, in that initial agreement that the parties sign, it states that they will not subpoena a mediator to court to testify in favour of one or the other.

What has happened in the Peel region; I have once in five years been subpoenaed to testify. One of the district court judges ruled that on the basis of the agreement that the parties signed in my office, it would be a conflict of interest for me

to testify and so he released me from the court. That is a closed mediation situation.

However, in an open mediation situation, the parties opt for the possibility of the mediator providing a report to the courts should the mediation break down. And in that report they are authorizing me to discuss the process and identify where the breakdown is which, of course, by way of evidence, would indicate that one or another party is not participating or is not co-operating. It would come out that way, although a good lawyer could argue it in favour of his client. Is that what you are getting at?

Mr McClelland: Yes, I think that is helpful. I just wanted to kind of walk through some of those potential difficulties in those scenarios.

Ms Kerrigan Brownridge: I guess, being a lawyer, I know darned well that you cannot control the lawyers. Once they are preparing a case for their client and, say, they know from the client what the process has been, that the husband or the wife just dug his or her heels in and would not go any further and they just wanted this, that and the other thing, the lawyer is going to try to use it to the best advantage in a court of law; put it in an affidavit, whatever.

It is hard to control that so you are right, there may be some disadvantage and that may be a very valid complaint. It is probably something that we have to look at in terms of—

Mr McClelland: Evolution and process.

The Chair: I do not see any questions.

Mr McClelland: I do not want this to become my ritual or anything but I just wanted to again say—it is the second time I have done it—happy birthday to Mr Jackson and say, for the record, that when I am 45 I hope I look as good as he does. I say that only because he is a friend and I think I can get away with it. At least he used to be.

Mr Jackson: Friendships by definition get tested frequently. That is why we are such good friends.

The Chair: I have a note in front of me here which says, “Please confirm on behalf of members of the committee that on the occasion of Mr Jackson’s birthday, he will be treating the committee members and staff to lunch in the legislative dining room.” Could you confirm that, Mr Jackson?

Ms Kerrigan Brownridge: Could we make an amendment, to add the presenting person?

Mr McClelland: Would you like that in the form of a motion?

Mr Jackson: It is a 200-seat restaurant, why not?

Mr McClelland: I would be prepared to move that if you would rule that in order.

Mr Jackson: It is my 34th birthday, to be correct.

The Chair: The resolution has been approved that Mr Jackson is treating everyone to lunch today on the occasion of his 45th birthday.

Mr Jackson: This is going in Hansard. That is going to create a lot of confusion, although Amy did indicate to me when I asked her last night, “Do you know what tomorrow is?” She said, “It’s your birthday, dad,” and I said, “Do you know how old I am going to be?” She said, “59 or something like that.” I am 39.

The Chair: On behalf of the members of the committee, I certainly want to thank you, Ms Kerrigan Brownridge, for coming before us today, particularly for bringing the very extensive and useful material. I am sure it will be very helpful to us when we prepare our final report.

The committee recessed at 1215.

AFTERNOON SITTING

The committee resumed at 1410.

The Chair: Good afternoon. The standing committee on administration of justice is in the 10th day of study into the issue of alternative dispute resolution in Ontario.

JACK R. MILLER

The Chair: Our first presenter this afternoon is Jack R. Miller, who is a senior partner in the law firm of Fasken Martineau Davis of Montreal, somewhat of an expert in this area. I will ask Mr Miller to please proceed.

Mr Miller: I am a lawyer in private practice. This is my 24th year of private practice. I became interested in alternative dispute resolution in approximately 1982, prompted by my clients, who were using methods that I was not familiar with to deal with disputes. This was somewhat embarrassing so I began an intensive research, if you will, into the background and have been following the development of this field on a very intense basis for that period of time.

I have applied these approaches in my law practice, to the point where I systematically apply them today. I have a commercial-administrative law practice for a very wide range of matters and I find that these approaches are applicable to almost every kind of dispute in some way and some degree. I would like to try to share with you what I call my research and development; that is to say, my trips out there across North America over the last eight years, my meetings with different professionals in this field and my efforts to develop products and approaches. I would like to share that with you and I would also like to share with you, while respecting the confidentiality of my clients, some of my practical experience.

First of all, ADR does work. We do not understand exactly why it works, but we know it works. Most people's experience of it, I found, is limited to two or three approaches or options. Some people have had experience with the courts, some people may have had experience with an arbitrator, some people may have had experience with a mediator, perhaps a conciliator. But there are actually multiple options. I have identified, from my research and development and from my own practice, 34 distinct options, systems, of resolving conflict and settling disputes. This would be one of the main pieces of information that I would like to

communicate to you this afternoon, because it is fundamental.

The courts, and in particular the trial conducted by a judge, are a method of resolving conflict and settling disputes. Negotiation is a method, arbitration is a method, mediation is a method, conciliation is a method, mini-trial is a method, and there are 30 others. Therefore, it is very important during the intake process, when one first encounters a conflict or dispute, to determine which is the appropriate approach for that particular dispute. One of the difficulties that I have experienced in my practice is the effort to try to fit every dispute into one slot, to make everything go through the judicial system, go through the arbitration system, be mediated or any other particular approach.

I represent the Kahnawake community of the Mohawk nation, the traditional people of the longhouse. I went with them to the program on negotiation at Harvard, to meet the faculty there. The program on negotiation is a consortium of universities. Roger Fisher, who I am sure you know, is the author of one of the ground-breaking works in this field, *Getting to Yes*. I might add incidentally that the subtitle, *Negotiating Agreement Without Giving In*, is very interesting. Normally negotiation is thought of as a compromise; somebody gives in. Therefore, it is quite a revolutionary approach where you reach agreement without giving in. How do you do that?

There was an encounter at that meeting between Roger Fisher and one of the clan mothers. The Iroquois are a matriarchal society. There were clan mothers present who were explaining their approach. Roger Fisher was saying to the Mohawks: "Your demands for sovereignty and so on, just reduce them to a shopping list. What's your shopping list? Don't go talking about sovereignty. It is going to scare a lot of people. Just, what's your shopping list? Reduce it down to 99 specific items you want."

The Mohawks had a lot of trouble with that. I think one thing that was happening there was that an approach was trying to be applied to work in all cases. For the Mohawks, their sovereignty was an aspiration, not necessarily a pragmatic, concrete, tangible subject matter. Perhaps all they needed to do was to be heard and listened to, and that would be one item. Their shopping list would be something quite different in nature, a very pragmatic, day-to-day, nuts-and-bolts type of approach.

While I am on the topic of the native people, I was originally consulted by them in a trade law matter. I explained they could obtain their objectives in a legitimate manner by negotiation or ADR. They expressed an interest in this. Somebody had taken an ADR course. What they found was that the ADR—our, say, non-Indian approach—was highly congruent with their own dispute resolution systems. Therefore, it was a common ground.

The approaches to conflict resolution and dispute settlement can be put on sort of a spectrum. I categorize them in two broad categories, facilitative and adjudicative. The facilitative approach is where a third party plays a supporting role to the parties in conflict and assists the parties themselves to resolve the matter. The adjudicative approach is where a third party decides for the parties. It is quite easy to demonstrate, through various hands-on exercises and other means, that the facilitative approaches produce more value for the parties. Therefore, one would normally try those first.

I believe that in many fundamental things that are going on in our society, such as the desire for people to have more control over their affairs, their bodies, their careers, ADR gives them that. This is actually why ADR is so powerful, because it places justice in the hands of the people.

The courts, in my experience, have always played a dual role. Their overriding concern has always been for the administration of justice. Courts fundamentally want to render justice, and of course one approach is through the trial, the judgement, the rendering of the judgement, deciding, applying the law to the parties. But judges have also tried to act as facilitators and, from my experience, it is very unusual that a judge does not ask the counsel, "Ladies and gentlemen, have you made any effort to try to resolve this matter?" And if you have not, you have a very upset judge on your hands because he has a tough job to do. He has to sort things out.

1420

The law has always treated the courts as a place of last resort. Certain equitable remedies, such as injunctions and so on, require the parties to have exhausted all other remedies prior to coming to the court for assistance. I would expect and anticipate that as ADR progresses and judges hear about it, they might ask the parties, "Have you made any effort to resolve this matter with the use of a facilitator, mediator, fact-finder, adviser, whatever, even know that these pro-

cesses exist?" I suspect that this is a way that ADR could be part of our law.

Recently I arranged with the Chief Justice of the Superior Court of the province of Quebec for two judges to attend a meeting at the Centre for Public Resources in the United States, which is promoting ADR, to meet with federal and state judges to discuss ways and means of the courts' supervising ADR. I am told that the judges derived a lot of benefit from that and that they want to go back to the next meeting. They want to put this on their program for next fall because it helps judges get the job done and it saves the courts' time for the cases which really need the judges.

I have made use, in Quebec in particular, of motions for declaratory judgement. The parties will be attempting to resolve a matter and hit some obstacle, which could be an ambiguous statute, let's say, some ambiguity in the law. They go to a judge and say, "Could you settle that legal question for us so that we can go back with that resolved and carry on our discussion?" That takes three to six months and not three to six years. I use that effectively and the Quebec Court of Appeal has now permitted the use of that remedy.

ADR is not something that is out in left field somewhere, it is not something sort of weird and wonderful, but it is an integral part of our justice system. We are already doing it intuitively. A very high percentage of cases are resolved prior to trial by the parties themselves. ADR seeks to help these resolutions come about earlier, better and with less waste of people's time.

Also, I would like to stress the distinction to be made between conflict and dispute. Often these are sort of lumped together, as if they were interchangeable or the same. I have a definition which is my own. I do not profess it has any great value other than that it is my own; I have something to work with. Conflict I define or understand as something that is internal to a person or institution. A dispute is something which involves interaction between two or more people or two or more institutions. Their dynamics are very different. Unless you are aware of the dynamics, things can get very confused, to say the least.

Conflict is something that occurs normally, naturally; it is part of our human condition. There is nothing wrong or worrisome about conflict. The question is, what happens to it? How is it handled? Can it be constructively handled? Can you prevent conflict escalating into disputes, disputes from escalating into confrontations and

confrontations escalating into war, metaphorically or otherwise?

ADR addresses not only the dispute but also the conflict, so that when the parties walk away from a court or from a process, they walk away with a desire to have positive future relationships, whether these are business partners, divorced couples or whatever.

I have applied this in practice. Most litigious matters have a high degree of stress and emotion to them. Take the example of two partners in a firm who have had a falling out. The firm dissolved. They are two partners in a business, family members in a privately held corporation. There is a lot of emotion in there. What happens often is that that emotion is not addressed and it generally fouls everything up, because where the emotion is not addressed and given an outlet and a channel, the outlet and channel that exist—

I will give you an example. Let's take the owners of a family business where the value of the shares may be in dispute. The valuation of shares is a relatively straightforward matter. There are precedents and expert opinions one can obtain. We can examine books. With our relationships, brother-sister, father-mother, father-children, mixed up into that, what happens is that you cannot resolve what would ordinarily be very simple matters to resolve.

What I have done is separate the two out. I bring in other professionals who are more competent than I to deal with conflict, family relationships and family interaction and they work on track 1, as it were, according to that agenda, and I would on track 2, with, say, the business valuation. We have clear discussions and actually the entire matter is expedited enormously.

Judge Réjean Paul told a story at a recent conference on native people. In a hearing of Inuit people in Newfoundland, an Inuit woman, a witness in a proceeding, wanted to tell her story of how she felt when the planes flew over her head at subsonic speeds or whatever, and it was ruled inadmissible. She never got to tell her story.

The judge ruled correctly from a legal perspective; it was a correct legal interpretation. However, we know that hurt is often part of conflict, and at the root. Often, if we are not aware of this dynamic, it comes out in forms of aggression, counterattack. I heard Elie Wiesel, a Nobel peace laureate and author, talk about the remedy for hurt being memory. Memory has many forms. One is telling one's story, for example. An arbitration, where there is a

relaxation of rules of evidence, could permit that. It could permit a person to tell his story and heal that hurt and therefore be able to deal better with other issues in a more concrete fashion.

Roger Fisher, in *Getting to Yes*, stresses, "soft on people, hard on issues." ADR seeks to build up relationships between people so that people feel secure, confident and are able to deal with the tough issues that have to be dealt with, and this is built into the structure. ADR processes are designed to contain chaos as an airplane is designed to withstand turbulence and as buildings are designed to withstand earthquakes. We know from the physical sciences what that chaos is.

1430

Scott Peck, who writes about consensus-building, talks about the four stages of building consensus, because ADR addresses not only disputes between two or three individuals but groups of people, and there are different approaches to that. Step 1 is what he calls pseudo-community. The people are all excessively polite to each other and falling over themselves to be polite. Step 2 is chaos. Nobody can agree upon anything, people are shouting, whatever. Step 3 is what he calls emptiness, getting rid of all the preconceived ideas as to how it could be neatly worked out, doing some listening and creative problem-solving, and step 4 is the consensus.

Unless you are aware of those dynamics, you are likely to conclude that this is hopeless. Also, negotiation, as a science, as a form of conflict resolution—not as the form, but as a form—has evolved from a positional approach where enormous intellectual energy was absorbed in trying to reconcile hopelessly irreconcilable positions; like, this was the end. You could not reconcile a position; what was the hope of this? Now positions are recognized and respected and—I would not want to say put to one side over here, and they go on to an examination of, what are the real interests of the parties here? What is the common ground?

John Burton, University of South Carolina, has done some tremendous work dealing with what he calls deep-rooted conflict. This is where conflict cannot be resolved by sort of management techniques; where there are bottom lines that cannot be compromised, such as human rights, such as aspirations, such as sovereignty. How do you approach that? These involve a whole process of approaching these conflicts. I refer to the relationship of parties in conflict as interaction, so the generic term for me is not

negotiation but interaction. The parties are interacting through a number of different ways, and the object of the exercise is to resolve the conflict and settle the dispute.

Something else I would like to stress is the importance of an interdisciplinary, multiprofessional approach. This is not the domain of anybody or any one profession, whether it is lawyers, psychologists, mediators, arbitrators, whoever. There are roles that each can play effectively. There is a contribution that each can make. Often what resolves conflicts and settles disputes are professionals or disciplines working together and interacting.

I also put this into practice in that I routinely, on a case-by-case basis, work with other professionals, such as psychologists, such as economists, such as management, such as actuaries—actuaries are the people who deal with risk. The law is something that is dealing with risk.

I would just like to bring to your attention that the bar of Quebec, the Quebec order of psychologists and the Quebec order of social workers have just signed an agreement to integrate their services in the family law field. I do not have 20 copies, but I have a copy, which I could leave with you. It is in the French language.

I might add that one of the applications of ADR is in intercultural disputes. It applies across the board, in different forms. It implies the family law, business, environment, trade law.

Trade law is a good example. I am a trade law lawyer, among other things, and the free trade agreement's dispute resolution mechanisms cannot do the job. Why? Because you cannot expect people to give up their sovereignty in advance. Only facilitated approaches could work, and for most cases, because there are deep-rooted conflicts there. There are basic interests like jobs at stake. You cannot apply techniques like trading jobs off and what have you. There are fundamental things at stake there.

I have written several papers which have been published in the United States encouraging the use of what I call mediation as a means of resolving trade law disputes or irritants between Canada and the United States under the free trade agreement. I would say in the antidumping and countervailing field, all that the formal adjudicators can do is express an opinion on whether or not the laws of a particular country were applied. They cannot actually come to grips with the dispute itself and resolve it.

Actually, the parties themselves, if given a chance, with appropriate support from third parties, could probably resolve most of these disputes in an afternoon, as a matter of fact. I might add that that third party might not necessarily be one person but could be a group of people, because the skills that are required evolve in the process. When you come into a dispute, often the parties are not talking to each other. Therefore, there are some skills of communication. Then they need skills to declare, what are the options? Parties do not know they have options. So there are many professions and disciplines that have a part to play in this. In my document here, I have given you some reference to them.

I think at this point I am going to stop talking so that I could answer some of your questions, because I know that you have a busy agenda this afternoon.

I have a document, though, that I would like to leave with you at the end, because I come into this, along with my colleagues, listening to our children, who ask us to heal our world. At our meetings that we have had to consider where we go with this professional firm, children were present and we listened to what they had to say. They keep us on track and do not allow us to stray from our goals. I tender a document to you in that connection.

1440

The Chair: Thank you very much for a very perceptive analysis of the ADR phenomenon. It is certainly obvious very quickly that you have a very firm grasp of the issue, philosophically and as a practitioner. We do have a number of questions and we will start with Mr McGuinty.

Mr McGuinty: I was particularly intrigued and very moved by the statement that you make, both in the concluding paragraph of your statement here and just orally, with regard to listening to children.

I had a little experience the other day that I thought was quite meaningful. I piled a number of little grandbrats into my car, and before I was able to turn on the ignition, the eldest, who is six, insisted that no engine could be started until all seatbelts were firmly fastened.

Another little incident: I was driving along and I came to a stop sign, to a little waif at a school crossing holding up the stop sign. When my car came to a halt, she looked at me and she said, "Sir, you should not be smoking." Very good.

It occurred to me that we have so much to learn from children, sometimes maybe the kinds of things we are trying to bring about through

legislation at an accelerated pace; for example, drug enforcement, the emphasis on which I think is like the often-used image of a Band-Aid on a cancer of the liver, or environmental issues, sensitivity and the love of God's creation, not only as a moral responsibility but for the purely economic things. I think that this is our hope, the children imbued with this, with that kind of childlike innocence. I am sure you are familiar with the poetry of William Blake. I was very moved by that aspect of your presentation.

I am also very intrigued by a very fine distinction you make and I would ask you to elaborate it somewhat. Do not apologize for it because it is your own. I think most of the refinement in language that we must have in an age largely insensitive to language must come from people like yourself who would proffer these distinctions. It is the distinction between conflict and dispute, sir. Elaborate on that one a bit. I find that very interesting.

Mr Miller: When I first started thinking about this, I did not see the distinction. It was only when I got into the workings of these processes that I understood the distinction. It is real, to start with; it is there. Conflict has been defined as hurt, and there are various ways in which we are hurt, and that can often translate into aggression. I remember at a conference I was at in the United States where they were talking about, I think it was perhaps the Arab-Israeli conflict. Somebody had bombed somebody. So the answer was, "We'll bomb them." What was happening was hurt was being piled upon hurt. We need to understand that dynamic to know how to deal with it. Hurt is best dealt with by sharing, and that can be done by a skilled facilitator. Business partners who have fallen out, whose business has collapsed, suffer that. So do children, people in divorce. There is inevitably, in almost all cases, hurt.

In accounts of the trade disputes between Canada and the United States, which one would think is a very esoteric area, if you read the accounts, they talk about hurt, that it is a very emotional, hurtful experience. I was astounded. Was it Jennifer Lewington who was the *Globe and Mail's* correspondent in Washington? I may get my names wrong here, but a report of the *Globe and Mail* on a Canada-US trade dispute re-pork of something talked about it in these very emotional terms. But nowhere in the dispute resolution mechanisms is this ever provided for. So it gets acted out, in other words.

Mr McGuinty: I think that is very appropriate. I was intrigued by a couple of television clips

from a meeting at the Royal York in which Mr Murphy, the American free trade negotiator, made a statement to the effect that, "Well, there might have been a few jobs lost, but they would have been lost anyway." But really what took the cake, and would that I had been there, was a southern US senator who is a very strong proponent free trade got up and said, and I quote him directly, "Well, you all got a nice piece of real estate up here." Talk about statements of that kind that can provoke conflict and hurt; the naïve ignorance of the feelings of Canadian people on their cultural identity and so forth. I think that kind of sensitivity of language—

One other point, sir, and we talked about this this morning and with a number of other people: People have talked about techniques for training mediators or facilitators. I know that, with some experience in counselling, you can develop certain techniques. But it seems to me that there is something more substantive than techniques. There must be a disposition of mind, there must be a capacity for a sympathetic, empathetic response, interpretation and feeling for the views of others. Have you come upon this problem, if you will, or this situation?

On the idea, for example, of our having people hanging out shingles as mediators, marriage counsellors or facilitators, what have you, I find that rather offensive because it opens the door to a kind of hucksterism. I do not think that training in the techniques, so to speak, such as they are—and apparently there are courses available at the University of Toronto—is enough. How do we go about getting the supply of people, people, I must say, without embarrassing you, with the kind of sensitivity that you project in such a compelling and moving manner?

Mr Miller: They exist. On the question of openness and inclusion rather than exclusion, I think it is important to keep as many doors open as possible because I feel we are in a transition time. There is a tremendous explosion of knowledge as to how our brain works, what produces our emotions and so on, and we must keep these doors open, in my view, until we have more knowledge. We must facilitate experimentation, allow people to know that they can experiment, remove obstacles, facilitate the process.

I believe that the law as it is presently written, by and large, permits people who want to do this the power to do it, because it is consensual among other things. However, most people do not know that they have got the options, and those judges feel uncomfortable because they do

not know that they have this ability or the options. So education is a big, big factor here.

Mr McGuinty: I say this with respect; my friend is trained in the trade of law. When we had the dean of the Osgoode Hall law school here a few days ago, he said that one of the faults in law school is the tendency of legal training to put in the forefront of the law students' minds the confrontational mode as the appropriate method of solving disputes.

I alluded to a book. Beware of the man one has read one book. Robert Maynard Hutchins wrote this in 1936 and little did he know what a prophetic sense he had when he spoke of professionalism in the law and medical schools as it was going to inhibit the training in the profession of law and almost act against the kind of disposition of thought, cast of thought, that you are advocating here. The dean of the Osgoode Hall law school, very interestingly, said that, for example, they have optional courses in mediation and these courses have become more popular in the last five years. He attributed that, in part, to the fact that there are more young ladies in law school, who bring with them a kind of sensitivity. You have to be careful of these things because you do not know what you say these days that can be attributed or misinterpreted as sexist or condescending. I am quoting him now, Cindy; you were there, so do not take offence. He attributed it in part to that, and I would tend to agree.

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Mr Miller: I find that the business schools have a very open approach because they want to solve conflict.

Mr McGuinty: Business schools?

Mr Miller: Yes. I work with business schools, particularly l'école des Hautes études commerciales in Montreal. I am afraid that the law schools are focused, in good faith, on the adversarial approach as though it were the only approach. This is the experience in the United States as well. The law schools seem to pay lipservice to this approach and the real action is taking place in the business schools.

Mr McGuinty: That is refreshing.

Mr Miller: I am very proud to be a lawyer, I might add, and a lot of lawyers have been responsible for the reform here.

Mr McGuinty: I am proud of lawyers, yes.

Mr Miller: But unless we get into this as a profession, we are going to get left behind.

Mr McGuinty: I am proud of lawyers, but I do not apologize for not being one.

Incidentally, I am refreshed by your remark about business schools because my knowledge of business schools is the exact opposite. I am dating myself with the Harvard Business School of 1955, but certainly business responsibilities in American society inculcated into the young mind that your primary obligation and allegiance was towards your shareholders, let the chips fall where they may, be it the common good or nefarious practices or what have you. That is your primary obligation. So I am delighted to hear that business schools are adapting accordingly. That is good news.

The Chair: I have a couple of questions, Mr Miller. I am sure you are aware of the general mandate of the committee. We are doing a study on ADR. We are trying to do an assessment of it, and hopefully will be able to come to some conclusions about how public policy should relate to this particular phenomenon, particularly in Ontario.

I note that you have provided us with a list with something like 35 or so ADR options. We have, over the past two and a half weeks, listened to ADR specialists in the field of family law, labour law, private judging, arbitration, multi-door dispute resolution, the Indian Commission of Ontario and the Office of the Ombudsman. We have looked at all of these and we are trying to make some sense out of the dynamic that is there in the system now. We are trying to decide how government policy should react to it or what lead government policy should take.

If you were, for example, the Attorney General of Ontario or Quebec, what policies would you try to put into place, whether they are by way of education, credentials or certification? What would you do, as a leader of government, in that particular area in terms of creating public policy to deal with the issue of ADR?

Mr Miller: Now I feel very humble. It is quite a challenging question. First, I feel there is an overwhelming need for public education. The vistas have got to be opened up. Therefore appropriation of funds for education from our schools right up to our law courts I think is a high priority at this stage.

The Chair: But would you include, when you mention law courts—excuse me for interrupting—trying to build in a component whereby judges would become more familiar with the area as well?

Mr Miller: Yes. I believe that judges want this. Some of them are afraid of it because they are going to have to do things that they are not equipped to do. But when they come to

understand there are 34 options, they are going to find some they are comfortable with, and they can invent others. I believe that judges would welcome this assistance because—there is a word in French that I like, “valoriser”—it adds value to people. It adds value to judges and value to the courts.

The Chair: I was very interested in your term “product development and systems.” We have heard some reference to that from a number of the other presenters. To what extent should government play a role in refining the science of ADR in terms of promoting it in universities, business faculties or law faculties or, I guess, interdisciplinary research into that area? How scientific is it, how scientific could it become, and what is the role of government in that area?

Mr Miller: I think it is scientific. It is intuitive and scientific, and those are not, I hope, contradictory terms. I think that there is research to be funded. Marvin Minsky, who is a professor at the Massachusetts Institute of Technology on artificial intelligence, has developed a profound respect for human intelligence in trying to build machines that think. Robert Axelrod, who is a political scientist, has done extensive research with this. Anatol Rapoport, who is a Toronto professor, I believe, of mathematics, has established the coefficient dynamic which underlies all ADR, including the courts, so we come to understand what co-operation really is, not only in a sentimental way but in a very pragmatic way.

So government could support research, and I believe there is a need for the law and, for example, psychology to interact more on a very pragmatic level. I do not know of any scientific research which correlates the two. I think what is happening is psychology is reforming our law and will continue to do so as we find out how the brain works.

The Chair: I found it curious—and I have not heard any other lawyers use the term in their practice—you referred to “intake” and “slot-fitting.” Obviously, because you are a proponent of ADR, you are able to put yourself into that philosophical mold, but is that not a minority mold that lawyers have; they do not think in terms of intake and trying to look at the ADR type of options to resolve disputes? As a profession, are they not still in the adversarial frame of mind? Although they think in terms of settlement, they think in terms of using power to settle cases or files.

Mr Miller: I believe that is a true statement. I believe there is a very slow evolution taking place. I work with my own partners, which is one

of the largest firms in Canada, on a one-on-one basis, very pragmatically. My partners support generally what I do. It offers many potential benefits for the legal profession, in very pragmatic terms, I might add. It should not be perceived, in my view, as a threat to the legal profession. On the contrary, it is a matter of survival.

The Chair: Is there a distinction in the role that a judge plays in the civil law system, such as we have in Quebec, versus the common-law system of the other provinces, in terms of how active they are in questioning witnesses and trying to resolve trials?

Mr Miller: In my view, no. It is more a function of the personality of the judge. I know that in Ontario, and I am a member of the bar in Ontario, Ontario judges have used—maybe as pretrial conferences. In Quebec, pretrial conferences also exist, and they are flexible enough to permit ADR processes, and some judges take advantage of that.

The Chair: Two weeks ago, Gordon Henderson, who is past-president of the Canadian Bar Association, was a presenter before our committee. He suggested a possible area of government policy would be to create a self-governing body in the area of alternative dispute resolution, relating to arbitrators, mediators, etc, so that it would be able to, for example, set standards, ethics and perhaps have some influence in the educational component of the issue. Do you think that might be a valid area of government involvement, government policy?

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Mr Miller: That worries me. I did not know about Mr Henderson’s statement, but that is one reason why I am here today. I see that as sort of dangerous, because I do not, first of all, want to see this approach as something outside of the administration of justice but as an integral, inherent part that makes the whole administration work better. Therefore, I think we have to be patient, we have to work with people who are there. People are in good faith, and they do not know there are options.

Take the term “binding.” What does that mean? In my practice, and I am a litigator, binding means perception that justice has been done, that due process has been followed—not somebody seizing your property. I mean, that could be a form of binding. But it means due process, and ADR offers people their day in court.

Why? The rule of justice is the right to a hearing and ADR listens to people. People in ADR will get listened to and they experience their day in court. They want a judge to listen to them. How many litigants have I heard say, "I want my day in court, even if I lose?" What does he mean? He means, "I want to be heard, by an impartial, objective person."

The Chair: I am very interested in your comment on the emotional component. As a senior partner in a major Canadian law firm, you are obviously dealing with some pretty heavy-hitting personalities. You indicated that on a number of occasions, you separate the legal or factual side from the emotional component and you work in parallel with other professionals, maybe psychologists or what have you, with these particular people. How amenable are some of these clients to the suggestion of introducing that emotional dimension to dispute resolution, particularly some of the pretty powerful personalities that you probably come into contact with?

Mr Miller: It is all in the approach. You cannot manipulate anybody. You have to be open, transparent with them, avoid fancy language, talk in very basic terms and protect confidentiality and privacy.

One experience I have had that sort of startled me is that, when I have been brought into a situation, obviously retained by one side—I remember in one case I decided I had better withdraw. The other side was very unhappy about that, so I started to play a different role, where the adversarial system—where one is there to maximize one's advantage at the expense of the other person—disappears, because your client can only win if the other side wins. It becomes a search then for, where is that common ground? The notions of conflict of interest change. That is a dynamic that changes as well.

The Chair: I was interested also in your comment on the alternative dispute resolution provisions of the free trade agreement and the comment that perhaps they are inadequate. You referred in that context to various emotional-type issues, such as sovereignty and that type of issue.

Mr Miller: Jobs.

The Chair: Exactly. I did not want in any of these proceedings to get into the issue that I am going to raise now, but I am going to do it, because your information has been very thoughtful and I think will be very useful to us. In the area of alternative dispute resolution between governments, whether they be provincial governments or whatever—and you have indicated

in one of the ADR options the heading "diplomacy." Do you see any of the ADR techniques as being useful in the impasse we seem to be at now in the Meech Lake process?

Mr Miller: Yes.

The Chair: How can these techniques, in your opinion, be introduced, maybe more so than they have, if they have been there, into that process?

Mr Miller: That is something I have been giving some thought to. I would like to have the opportunity to give more thought to that.

There is a book that has been published called *Letters to a Québécois Friend*, by Philip Resnick.

Mr McGuinty: Yes; beautiful.

Mr Miller: I read that, and the bookseller whom I bought it from said he had felt sad when he read that, and I did too, because I felt it was two people trying to talk to each other and neither was hearing the other. There were certain concrete reasons for that. I think that if some other approaches were used and ADR was employed in these approaches, it could work.

I have been working, to some degree, with the Honourable John Ciaccia, who is not only the Minister for International Affairs in Quebec but also the minister for Indian or aboriginal affairs, as to how these techniques could be applied in relations between the government of Quebec and the aboriginal people. I would also like to talk to him about how they could be used in the Meech Lake impasse, because they could be. You would have to design a process to fit that need. You could not take something off the shelf and say, "Here, zap, that's the way you do it." You would have to recognize the impasse, then decide how to deal with it. They are dealing with deep-rooted conflict there, but there are ways and means to do it.

Mr McGuinty: I do not know if you happened to see the interview between the two authors of those letters on Canada AM the other day.

Mr Miller: No, I did not.

Mr McGuinty: That is unfortunate, because it illustrated very, very well the point you have made. The person interviewing obviously was completely, totally unskilled and tried to be little more than provocative. The skilled person in that setting could have, I think, brought together a meeting of minds of a kind that certainly was not shown during that 12-minute encounter. It was very sad.

Mr Miller: I felt sad because there is a lot of beauty in that exchange of feeling, but they were not hearing each other, because it was often

expressed in the form of attack on the other, among other things.

Mr McGuinty: That is right.

The Chair: Do you have any wrapup comments, Mr Miller?

Mr Miller: My wrapup comment is being distributed.

The Chair: The wrapup comment is The Peaceosaurus.

Mr Miller: Yes.

The Chair: We will look at it with interest. On behalf of the committee members I want to thank you, Mr Miller, for coming to our committee and sharing your ideas and experiences with us. I assure you they will be very useful in our deliberations and in our final report to the Legislature. Thank you very much.

The committee will adjourn for 10 minutes, and then we will be going in camera to discuss the nature of the report that we will be discussing.

The committee continued,in camera at 1520.

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